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Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

AARON WESTENDORP,
A Minor with Disabilities, et al.,

Petitioners,

-versus-

JESSE "THE BODY" VENTURA, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether this Court's decision in *Agostini v. Felton*, 521 U.S. 203 (1997) "changed the law" of the Establishment Clause, such that a governmental defendant's reliance on earlier precedent (*Aguilar v. Felton*, 473 U.S. 402 (1985)) for its policy of denying special education to children with disabilities attending religious schools, absolves the defendant of liability for attorney fees under 42 U.S.C. §1988?

II. Whether, in an action under 42 U.S.C. §1983, intervening case law favorable to a plaintiff's position on an important legal issue defeats the plaintiff's entitlement to attorney fees under 42 U.S.C. §1988, where the plaintiff prevails in obtaining relief in part because of the new, favorable precedent?

III. Whether the "catalyst" theory of attorney fee entitlement under 42 U.S.C. §1988 remains operative following *Farrar v. Hobby*, 506 U.S. 103 (1992) (*see Friends of the Earth v. Laidlaw Environmental Services*, ___ U.S. ___, 120 S.Ct. 693, 711-12 (2000))?

LIST OF PARTIES

Pursuant to Supreme Court Rule 14.1(b), the parties to this proceeding are:

Petitioners:

Aaron Westendorp, a minor with disabilities, by and through his parents and natural guardians, Krista and Douglas Westendorp, Krista and Douglas Westendorp individually, Sarah Peter, a minor with disabilities, by and through her parent and natural guardian, Joan Peter, Joan Peter individually.

Respondents:

Jesse "The Body" Ventura, Governor of the State of Minnesota, and Christine Jax, Commissioner of Minnesota Department of Children, Families and Learning.

Non-Respondent Parties in Merits Proceedings Below:

Independent School District No. 877 (Buffalo, Minnesota) and Independent School District No. 273 (Edina, Minnesota).

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Petitioners Aaron Westendorp, Krista Westendorp, Douglas Westendorp, Sarah Peter, and Joan Peter respectfully petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The attorney fee opinion of the Court of Appeals (Pet. App. 1-30), for which certiorari review is sought, is reported at 187 F.3d 829. The attorney fee opinion of the District Court (Pet. App. 31-92) is reported at 18 F.Supp.2d 1002. The final merits opinion of the District Court in favor of petitioners (Pet. App. 93-106) is reported at 35 F.Supp.2d 1134. The merits opinion of the Court of Appeals in favor of petitioners (Pet. App. 107-148) is reported at 155 F.3d 992. The initial merits opinion of the District Court (Pet. App. 149-206) is reported at 958 F.Supp. 1383.

JURISDICTION

The judgment of the Court of Appeals, 187 F.3d 829 (Pet. App. 1-30), was entered on August 13, 1999. Petitioners filed a petition for rehearing and rehearing en banc on August 27, 1999, which was denied on September 30, 1999 (Pet. App. 207).[1] By order of December 13, 1999 (Pet. App. 263), Justice Thomas extended the time for filing a petition for writ of

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[1]On November 1, 1999, petitioners filed an Application with Chief Judge Wollman for leave to file a motion for reconsideration in light of the conflicting intervening attorney fee decision in *Carhart v. Stenberg*, 192 F.3d 1142, 1151-52 (8th Cir. 1999), *cert. granted in part*, 120 S.Ct. 865 (Jan. 14, 2000). By order of November 9, 1999 (Pet. App. 208), Chief Judge Wollman referred petitioner's Application to the full court and ordered briefing thereon. By order of December 27, 1999 (Pet. App. 209), the Court of Appeals denied petitioner's Application on the ground that there is "no provision in the Court's rules for the filing of [such] an application ...."

certiorari to February 27, 2000. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

1. ***Introduction and Overview.*** This case presents questions concerning the application of the civil rights attorneys fees statute, 42 U.S.C. §1988(b), to situations where a plaintiff has prevailed in part because of an intervening decision of this Court favorable to the plaintiff on an important issue. Petitioners (plaintiffs below) are two families that successfully challenged a Minnesota rule that *prohibited* on-site special education for children with disabilities attending religious private schools but *required* such services for children attending non-religious private schools. Petitioners challenged the rule as a violation of the Free Speech, Free Exercise, and Equal Protection clauses of the U.S. Constitution, of the Individuals with Disabilities Education Act, 20 U.S.C. §1400 *et seq.* ("IDEA"), and of state law. The State of Minnesota defended on numerous grounds, including that its disparate treatment of children with disabilities attending religious schools was required by the Establishment Clause.

A year into the litigation, following a decision of the district court sustaining plaintiffs' constitutional claims, *Peter v. Johnson*, 958 F. Supp. 1383, 1395 (D.Minn. 1997) (Pet. App. 149), and after completion of discovery against the State, this Court decided *Agostini v. Felton*, 521 U.S. 203 (1997). *Agostini* rejected an Establishment Clause argument similar to the one asserted by Minnesota in the instant case. After *Agostini*, the State abandoned its defense of the rule and agreed to an injunction against its enforcement. Pet. App. 253 (Injunction). *See Peter v. Wedl*, 155 F.3d 992, 997 (8th Cir.

1998) (Pet. App. at 122-23) (The state rule "violated the plaintiffs' rights to free exercise of religion, free speech, and equal protection, and the district court properly enjoined its enforcement."). Plaintiffs went on to obtain full relief against all defendants, including the school districts that had denied special education to the plaintiff families in part because of the state rule. *See* Pet. App. 256 (Peter settlement with Buffalo district); 155 F.3d 992 (Pet. App. 107) (Eighth Circuit merits decision in Westendorps' favor against Edina district); *Westendorp v. ISD #273*, 35 F.Supp. 2d 1134 (D. Minn. 1998) (Pet. App. 93) (awarding full relief against Edina on remand).

Following the injunction against the State, petitioners sought attorneys fees pursuant to §1988. The Court of Appeals held that petitioners were not "prevailing parties" against the State on the grounds that *Agostini* changed the applicable law of the Establishment Clause mid-stream; that the State had relied on pre-*Agostini* case law; and that the State abandoned its defense following *Agostini*. *Peter v. Jax*, 187 F.3d 829 (8th Cir. 1999) (Pet. App. 1). It was "*Agostini*, not the litigation" (*id.* at 835; Pet. App. at 16) that caused the state's change in position, and consequently, petitioners did not "prevail" in the case. *Id.* at 834 (Pet. App. 15-16) ("[B]ecause of the intervening and dispositive *Agostini* decision, we do not believe the general rule [of awarding fees where litigation leads to a settlement or consent decree] is applicable."). Petitioners seek review of this ruling.

2. *The Merits Litigation.* The facts are fully set forth in the Eighth Circuit's decision for petitioners on the merits. *Peter v. Wedl*, 155 F.3d at 994-996 (Pet. App. 114-19). The underlying litigation involved the denial of special education services to two children with disabilities, because their families had enrolled them in religious schools. *Id.* at 996-97

(Pet. App. 121-25). Petitioner Aaron Westendorp (ages 10-13 during the litigation) suffers from severe disabilities resulting from a brain stem lesion. He is partially paralyzed from the eyes down, breathes through a permanent tracheotomy tube, eats through a permanent gastrostomy tube, and cannot speak. He has full cognitive functions, however, and communicates through finger spelling. Petitioner Sarah Peter (ages 5-7) suffers from disabilities associated with Down Syndrome. Both children were determined by their public school districts to be entitled, under the IDEA and relevant state law, to have a one-on-one paraprofessional assist them in a regular classroom setting. *See Peter v. Johnson*, 958 F.Supp. at 1387-88 (Pet. App. at 164-65).

Both children were initially enrolled in religious schools. However, their school districts refused to provide Aaron or Sarah with a paraprofessional at a religious school, relying on Minnesota Rule 3525.1150 ("state rule"), and both families were forced to withdraw their children from those schools in order to obtain the services they needed. The state rule, until enjoined by the District Court (*see* Pet. App. 253), required local school districts to provide on-site special education services to children attending *nonreligious* private schools, but forbade such services if the child attended a *religious* private school. *Peter v. Wedl*, 155 F.3d at 994-96 (Pet. App. at 114-16, 121).

The chronology of events is important: Petitioners filed suit on July 26, 1996 against state officials responsible for enforcing the state rule, seeking an injunction against the rule's enforcement to deny Aaron and Sarah paraprofessionals at religious schools. Plaintiffs also named as defendants the two school districts where the children live. Plaintiffs moved for preliminary injunctive relief to permit Aaron and Sarah to

receive paraprofessionals at the families' chosen religious schools that fall. The school districts raised the state rule as a defense. The State raised many defenses, arguing that plaintiffs lacked standing; that plaintiffs had failed to exhaust administrative remedies; that the suit was unripe; that the Complaint failed to state affirmative claims to relief under the Free Speech, Free Exercise, and Equal Protection clauses; that the state rule was consistent with IDEA; and that the rule was required by the Establishment Clause. *Peter v. Johnson*, 958 F. Supp. 1383 (Pet. App. 149). However, the State's "primary defense in this case was that the school districts, in applying the rule, did not discriminate against these plaintiffs."[2]

The District Court denied petitioners' motion for expedited hearing and scheduled the motion for preliminary injunction to be heard together with defendants' motions to dismiss, on November 8, 1996.[3] The District Court ruled on the pending merits motions on March 26, 1997, rejecting the State's motion to dismiss plaintiffs' constitutional claims on the authority of this Court's decisions in *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995), and *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993):

> Plaintiffs allege violations of the Freedom of Speech and Free Exercise of Religion Clauses

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[2]The State acknowledged at the fees argument below (Feb. 20, 1998 Tr. at 24): "Our primary defense in this case was that the school districts, in applying the rule, did not discriminate against these plaintiffs.... That was our position from the outset of the litigation and it continues to be our position today."

[3]This Court granted certiorari in *Agostini* on January 17, 1997 (519 U.S. 1086 (Mem.)), two months after these motions were argued in the District Court – a fact that is significant to the chronology and legal issues presented below.

> of the First Amendment .... [T]he court concludes that plaintiffs have sufficiently alleged that defendants treat nonpublic religious schools differently from nonpublic nonreligious schools with respect to on-site paraprofessional services. Such allegations sufficiently allege violations of the First and Fourteenth Amendments of the U.S. Constitution to overcome defendants' motions to dismiss.

Peter v. Johnson, 958 F. Supp. at 1395 (Pet. App. at 185-86) (citations omitted).

The District Court ordered that discovery proceed on petitioners' constitutional claims. *Id.* at 1401 (Pet. App. at 206). On May 22, 1997, plaintiffs deposed the Director of Special Education for the State of Minnesota, Mr. Wayne Erickson. Mr. Erickson testified that the State's policy indeed required disparate treatment of children with disabilities attending religious private schools. *See Peter v. Wedl*, 155 F.3d at 994-995 (Pet. App. at 115-16) (citing deposition testimony of Mr. Erickson). Petitioners then prepared a renewed motion for a preliminary injunction, hoping to obtain relief in time for the 1997-98 academic year (a full school year having elapsed since the litigation began).

On June 23, 1997 – nearly a year after the Complaint in this case was filed – this Court decided *Agostini*. Following this Court's earlier decision in *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), *Agostini* held that the Establishment Clause does not require denial of on-site education services at private religious schools under a neutral government program. The Court formally overruled its earlier decision in *Aguilar v. Felton*, 473 U.S. 402 (1985) as contrary to *Zobrest* and other cases. *Agostini*, 521 U.S. at 218-236.

Agostini did not involve any affirmative claim under the Free Speech or Free Exercise clauses challenging denial of services to children attending religious schools. The only question decided was whether the Establishment Clause *required* denial of such services.[4]

Following the decision in *Agostini*, counsel for the State wrote to counsel for plaintiffs asking that they put the litigation "on hold" pending the State's review of *Agostini*. Pet. App. 210 (letter from Rachel Kaplan, June 24, 1997). Counsel for plaintiffs replied that they were preparing a motion for a preliminary injunction to be filed shortly, and urged the State to abandon its defense of the rule, given *Agostini*. Pet. App. 212 (letter from Michael Paulsen, June 24, 1997) ("We believe that *Agostini* very strongly confirms plaintiffs' position in this litigation."). The State replied to plaintiffs' counsel, stating that it would no longer enforce the state rule, but adding that "[t]he State Defendants' position is that Plaintiffs' attorneys are not entitled to recover any attorney's fees in this matter. This litigation simply was not

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[4]As noted, this Court granted certiorari in *Agostini* two months after the merits motions had been argued in the District Court, and decided the case three months after the District Court had rejected the State of Minnesota's motions to dismiss, and following completion of petitioners' discovery against the State.

We note for the Court that counsel for petitioners in the instant case filed an amicus brief on behalf of the Peter and Westendorp families, in support of petitioners in *Agostini*, highlighting the facts of the Peter and Westendorp case and arguing that *Aguilar* should be overruled as contrary to *Zobrest*. *See* Brief of Sarah Peter, et al., 1997 WL 86250 (Feb. 27, 1997). Petitioners argued that *Aguilar* had the potential to mislead and confuse government officials, as illustrated by petitioners' litigation with the State of Minnesota. As explained below, the lower courts in this case thought it significant that counsel for petitioners were "aware" of *Agostini's* pendency and thought that this Court's anticipated decision in *Agostini* likely would be dispositive of the Establishment Clause issue in the instant case as well. *Peter v. Jax*, 187 F.3d at 837 (Pet. App. at 24).

the catalyst for the change/non-enforcement in the Rule." Pet. App. at 218 (letter from Rachel Kaplan, June 27, 1997). The State demanded that plaintiffs agree to dismiss the suit against the State Defendants. *Id.* at 217.

Plaintiffs' counsel asked the State to withdraw its pending discovery and give binding assurances that it would permanently change the rule, as a condition of any dismissal. Pet. App. 221 & 228 (Paulsen letters of July 2 & 7, 1997). The State conceded that it could not bind the state rulemaking authority to change the rule, and that it could not assure the rule would not be invoked by the school districts against Aaron and Sarah, and therefore agreed to plaintiffs' requested injunction against enforcement of the rule until it was permanently changed. Pet. App. 244 (Stipulation). The District Court granted plaintiffs' motion, issuing the requested injunction against enforcement of the rule: "Plaintiffs' motion for a preliminary injunction against the State Defendants is hereby GRANTED. The State Defendants are hereby enjoined and restrained from enforcing Rule 3525.1150 insofar as it prohibits provision of special education services to Plaintiffs Sarah Peter and Aaron Westendorp on the premises of a private religious school." Pet. App. at 254.

Following the injunction against the State, the Buffalo School District settled with the Peter family, agreeing to provide Sarah a paraprofessional at a religious school and to pay $31,500 in damages and attorneys fees. The Edina School District abandoned its reliance on the state rule and attempted to defend its non-provision of a paraprofessional to Aaron Westendorp on other grounds. The District Court agreed with Edina's position and granted summary judgment against the plaintiffs. *See Peter v. Wedl*, 155 F.3d at 996 (Pet. App. at 119). The Eighth Circuit reversed, finding that Edina

"conceded that it relied on" the unconstitutional state rule and, further, that Edina's refusal to provide a paraprofessional at a private religious school also violated the IDEA. *Id.*, at 995-98, 1001 (Pet. App. at 116-26, 134-35). On remand, the District Court granted the Westendorp family full relief against the Edina district. *Westendorp*, 35 F.Supp.2d 1134 (Pet. App. 93).

The result of the litigation was that plaintiffs obtained full relief on the merits against all defendants: Plaintiffs obtained a consent decree against the State, enjoining enforcement of the unconstitutional state rule and mandating a permanent change in the rule; plaintiffs obtained a prompt settlement with the Buffalo district, granting full prospective relief and damages and fees in the amount of $31,500; and plaintiffs obtained, eventually, final permanent injunctive relief against the Edina district.

3. *The Fees Litigation*. Pursuant to the terms of the consent decree against the State, the matter of attorneys fees remained for further litigation. Pet. App. at 254-55.[5] A Magistrate Judge rendered the decision of the District Court, pursuant to 28 U.S.C. §636(c). *Peter v. Wedl*, 18 F.Supp.2d 1002 (D.Minn. 1998) (Pet. App. 31). The court denied attorneys fees on the ground that, "*[u]ntil the Supreme Court changed the law in its Agostini opinion*, the State Defendants, like the lower courts, were under a duty to follow prior Supreme Court precedent that was at odds with the result sought by the Plaintiffs in the litigation." 18 F.Supp.2d at 1020 (Pet. App. at 88) (emphasis added). The court reasoned that plaintiffs' litigation thus "was not the catalyst for the action taken by the State Defendants," *id.* at 1015 (Pet. App. at 74); rather, the change in policy was "the result of the Supreme

[5]The separate matter of attorneys fees against the Edina School District remains pending in the District Court.

Court decision in *Agostini*, as Defendants claim." *Id.* at 1015-16 (Pet. App. at 74).

The court concluded that, in the alternative, "special circumstances" justified denial of an award of attorneys fees. 18 F.Supp.2d at 1018 (Pet. App. at 83). The court stated that Congress's purpose in providing attorneys fees for prevailing parties in section 1983 actions was "'to encourage attorneys to prosecute constitutional *violations*.'" *Id.* at 1020 (Pet. App. at 88-89) (emphasis by District Court; citation omitted). In the court's view, the State had committed no "violation" of law warranting fees under §1988 because "[w]hen this action was commenced, the State Defendants were confronted with directly adverse, controlling Supreme Court precedent" they were bound to obey. *Id.* The court concluded that awarding fees under such circumstances would encourage litigation challenging existing precedent and that this was contrary to the purpose of the fees statute: "The objective of Congress, after all, is not to encourage lawsuits, but rather to encourage public officials to act in accordance with the Constitution." *Id.*

The Eighth Circuit affirmed.[6] The court agreed that, because *Agostini* intervened, plaintiffs were not prevailing parties within the meaning of 42 U.S.C. §1988. *Peter v. Jax*, 187 F.3d at 833-836 (Pet. App. at 12-22). The court acknowledged that a plaintiff is a prevailing party under §1988 if he obtains "'some relief on the merits of his claim ... against the defendant from whom fees are sought,' either through an enforceable judgment or comparable relief." *Id.* at 833 (Pet. App. at 12) (quoting *Farrar v. Hobby*, 506 U.S. 103, 111 (1992)). The court also acknowledged that plaintiffs had

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6 [6]Rehearing en banc was denied by a divided vote. Judge Richard S. Arnold and Judge McMillian voted to grant the rehearing petition. Pet. App. at 207.

obtained an enforceable order enjoining the State from enforcing its discriminatory rule. *Id.* at 832-33 (Pet. App. at 10-12). However, the court stated that "because of the intervening and dispositive *Agostini* decision, we do not believe that the general rule is applicable." *Id.* at 834 (Pet. App. at 15-16). Like the district court, the Eighth Circuit thought that the State's prompt change of position after *Agostini* meant that it had no responsibility for fees, even for the period preceding *Agostini*. "After *Agostini* was decided, it seems to us the entry of the stipulated injunction was at most a technical success, which would not entitle appellants to attorney's fees." *Id.* at 835 (Pet. App. at 17). "[A]ny relief obtained was the result of *Agostini*, not the litigation." *Id.* at 836 (Pet. App. at 20).

The Eighth Circuit also agreed that *Agostini* was a "special circumstance" justifying creation of an exception to statutory fee liability, for two reasons. "First, as the district court noted, until the Supreme Court's decision in *Agostini*, the State had no choice but to follow *Aguilar*, even though it might have been undermined by *Zobrest*." *Id.* at 837 (Pet. App. at 24). "This court has held that 'special circumstances ma[d]e a fee award unjust' against a defendant 'who did only what it reasonably believed was compelled by state law.'" *Id.* at 838 (Pet. App. at 27) (citations omitted).

Second, the court thought that since appellants' counsel were "aware" that this Court had granted certiorari in *Agostini*, petitioners should not have "continued to litigate the matter and incur fees," 187 F.3d at 837 (Pet. App. at 24), if they believed that *Agostini* would support their position on the Establishment Clause issue. *Id.* at 837-38 (Pet. App. at 24-25). The court thought denial of fees appropriate "'to discourage unnecessary litigation.'" *Id.* at 838 (Pet. App. at 25) (citations

omitted). The Eighth Circuit did not specify when plaintiffs should have discontinued their efforts to invalidate the state rule, but denied fees for the entire period of plaintiffs' litigation against the State.

Reasons for Granting the Writ

This case presents an important and recurrent question concerning the "retroactivity" of judicial decisions, *see Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993), as applied to the issue of attorneys fees under 42 U.S.C. §1988: When, if ever, does intervening case law *favorable* to a section 1983 plaintiff's position break the chain-of-causation otherwise linking plaintiff's lawsuit and a defendant's change of conduct giving plaintiffs the relief sought, so that plaintiff can be said *not* to be a "prevailing party" within the meaning of section 1988? This case stands squarely at the intersection of this Court's decisions in *Harper*, embracing the rule of full retroactivity of judicial decisions, and *Farrar v. Hobby*, 506 U.S. 103 (1992), construing 42 U.S.C. §1988's "prevailing party" requirement.

The courts below held that this Court "changed the law in its *Agostini* opinion" (18 F.Supp.2d at 1020, Pet. App. at 88), and, accordingly, that Minnesota's good faith reliance on precedent and prompt abandonment of its Establishment Clause defense after *Agostini* negates any claim that plaintiffs "prevailed" in the litigation – even though plaintiffs succeeded in obtaining full relief in the form of a consent decree and injunction against enforcement of the state rule (and, ultimately, a permanent change in the rule). In substance, the courts below held that new judicial decisions on questions of constitutional law should not be given retrospective application in other pending cases, for attorneys fees purposes.

Peter v. Jax, 187 F.3d at 834 (Pet. App. at 15-16) ("[B]ecause of the intervening and dispositive *Agostini* decision, we do not believe the general rule is applicable.").

This case significantly affects incentives to bring civil rights litigation of all kinds. The decision of the Eighth Circuit directly conflicts with the decisions of two other federal circuits and a three-judge district court, *see infra* at 20-28, and enlarges the circuit conflicts over post-*Farrar* causation. *See Friends of the Earth v. Laidlaw Environmental Services*, ___ U.S. ___, 120 S.Ct. 693, 711-12 (2000) (noting the extensive conflicts on "catalyst" causation theory after *Farrar*). As suggested in *Laidlaw*, these issues present recurrent problems in §1983 litigation. *Id.* This Court's review is needed to resolve the direct conflict in the lower federal courts over the effect of intervening precedent on attorneys fees liability under §1988, to clarify the confusion and division that prevails in the lower courts over "causation" issues in §1988 fee litigation generally, and to correct the Eighth Circuit's erroneous decision -- a decision at odds with both this Court's retroactivity jurisprudence and with *Agostini* itself.

I. The Decision Below Conflicts with this Court's "Retroactivity" Cases and with this Court's Characterization of *Agostini v. Felton* as Not Having "Changed the Law" of the Establishment Clause.

The court below held that an "intervening and dispositive ... decision" of this Court that resolves an issue of law in a way helpful to the position of a section 1983 plaintiff in another pending case, deprives that plaintiff of attorneys fees under §1988. *See* 187 F.3d at 834 (Pet. App. at 15-16). Because the state initially acted in reliance on *Aguilar*, and

abandoned its Establishment Clause defense (and agreed to an injunction against its policy) following *Agostini*, plaintiffs were not "prevailing parties" against the State. Plaintiffs did not receive "any relief which was not mandated by *Agostini*." *Id.* at 836 (Pet. App. at 21) (internal punctuation omitted).[7]

1. The Eighth Circuit's holding directly conflicts with this Court's retroactivity analysis in *Harper*. *Harper* prohibited "the erection of selective temporal barriers to the application of federal law," 509 U.S. at 97, stating that

> [w]hen this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review *and as to all events, regardless of whether such events predate or postdate our announcement of the rule.*

Id. (emphasis added). Under *Harper*, the law governing a case is – in *all* respects – the decisional law at the time the case is

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[7]The Eighth Circuit's characterization of *Agostini* as "intervening and dispositive" is itself dubious. *Agostini* notes that it was *Zobrest* that had changed the applicable rule and rejected the doctrinal underpinnings of *Aguilar*. *See Agostini*, 521 U.S. at 225 ("[I]t was *Zobrest* – and not this case – that created 'fresh law'"). Moreover, *Agostini* did nothing to *compel* the relief petitioners sought: invalidation of the State's religiously discriminatory rule for provision of special education services. At most, *Agostini* removed any shred of Establishment Clause *defense* the State might have had against petitioners' affirmative constitutional claims under the Free Speech and Free Exercise clauses. Petitioners' *affirmative* claims were supported by *Rosenberger*, 515 U.S. 819, and *Hialeah*, 508 U.S. 520, not by *Agostini*. Indeed, the District Court had already so held, sustaining plaintiffs' constitutional claims against the State's motions to dismiss months before *Agostini* was decided. *See Peter v. Johnson*, 958 F. Supp. at 1395 (Pet. App. at 186).

finally decided or settled, not (as the lower courts in this case believed) the law that existed at any prior time. Here, the lower courts erected a "selective temporal barrier" to application of this Court's decision in *Agostini*, as to the event of attorneys fees. The lower courts held that, for purposes of fees liability, the relevant governing law is the decisional law as it existed at the time suit was brought. *See* 18 F.Supp.2d at 1020 (Pet. App. at 89) (emphasizing that purpose of fee statute is to encourage suits against constitutional "*violations*" and that no violation of law existed "[w]hen this action was commenced," because State was acting in conformity with decisional law at the time), *aff'd*, 187 F.3d at 837 (Pet. App. at 24) ("[U]ntil the Supreme Court's decision in *Agostini*, the State had no choice but to follow *Aguilar*").

The lower courts reasoned that where a new judicial decision "changes the law," it would be unfair to award attorneys fees against governmental defendants who had relied on the former interpretation, *see* 187 F.3d at 834 & 837 (Pet. App. at 16 & 24) (noting State's reliance on *Aguilar*), and, indeed, *improper* to award fees to plaintiffs who challenged such reliance. *Id.* at 837-38 (Pet. App. at 23-25) (counsel should not have pressed claims if another pending case might resolve a legal issue common to the two cases); 18 F.Supp.2d at 1020 (Pet. App. at 90) ("[T]he idea of encouraging litigation is at odds with the goal of encouraging public officials to act in accordance with applicable decisions of the Supreme Court.").

This analysis is manifestly unsound, under *Harper*. The lower courts were required to treat this case, *as to all events* (509 U.S. at 97), as if *Agostini* had been decided before the suit was ever filed. New judicial decisions do not, as the district court believed, "change[] the law" (18 F.Supp.2d at 1020; Pet. App. at 88); they state what the law always was.

The *meaning* of the Establishment Clause was the same on the day petitioners filed suit as it was on the day *Agostini* was decided. The fact that *judicial interpretations* may change does not mean that this Court "changed the law" governing this case. The law governing this case – at all stages, as to all events – was *the First Amendment*. And *Agostini* states what the proper interpretation of the Establishment Clause is and always was.

To be sure, lower courts (and public officials) do not always understand this. Many lawyers and judges think of "the law" in terms of judicial decisions – a habit perhaps bred of the common-law case method of legal education. The lower courts' error here is thus perfectly understandable: if one thinks in such terms, then a government official's reliance on past precedent seems to be "compliance with the law." (The district court expressed doubt "whether this is even a [§]1983 action as to which [§]1988 would apply," Feb. 20, 1998 Tr. at 49-50, given that *Aguilar v. Felton* supported the State's policy at the time the litigation was commenced!)

This is not the law, however. Petitioners' §1983 suit challenged state conduct as not being in conformity with the correct understanding of the Constitution. Petitioners' claims on the merits were sustained in this regard, first by the District Court (as against a motion to dismiss), 958 F.Supp. at 1394-95 (Pet. App. at 186-87), and then by the Eighth Circuit. 155 F.3d at 996-998 (Pet. App. at 120-26). Petitioners defeated the State's defense of its rule and obtained an injunction against its enforcement. In short, petitioners *won*. That is all that matters. The State's reliance on *Aguilar v. Felton*, reasonable or not, is immaterial. Under *Harper*, petitioners were entitled to the full benefit of intervening favorable precedents of this Court. Courts "can scarcely permit the substantive law to shift and

spring according to the particular equities of individual parties' claims of actual reliance on an old rule and of harm from a retroactive application of the new rule." 509 U.S. at 97 (internal punctuation omitted). *See also James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 543 (1991) (Opinion of Souter, J.). Courts have no authority selectively "to disregard current law or treat similarly situated litigants differently." *Harper*, 509 U.S. at 97, quoting *American Trucking Assns. v. Smith*, 496 U.S. 167, 214 (Stevens, J., dissenting).

To deny attorneys fees to petitioners because of an "intervening and dispositive" decision of this Court is to treat otherwise similarly situated litigants differently depending on whether it was their case, or some other, that announced a new interpretation of law – precisely the result disapproved in *Harper*. Suppose, for example, that *Agostini* had never been decided by this Court. Suppose the lower courts in the instant litigation had ruled against petitioners' claims on the merits, on the authority of *Aguilar*, and this Court granted certiorari and reversed, rejecting the Establishment Clause defense (for much the same reasons it was rejected in *Agostini*) and accepting petitioners' affirmative claims for relief (*compare Rosenberger*). There would be no doubt that petitioners would be entitled to attorneys fees. *See Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 1996 WL 537859 (W.D.Va. 1996) (awarding fees). Under the analysis of *Harper*, the result should be no different simply because *Agostini* was decided while the instant case was still in the lower courts. If petitioners would have been entitled to fees if theirs was the case that made "fresh law," they should not be treated

differently simply because *Agostini* was decided while their case was in the midst of litigation.[8]

2. The decision below also conflicts with *Agostini*. In *Agostini*, this Court specifically rejected the premise of the lower courts here: that the Court's Establishment Clause holding in the *Agostini* case broke new ground. To the contrary, this Court held that the governing interpretation of the Establishment Clause *had changed four years earlier* – in the *Zobrest* case: "[I]t was *Zobrest* – and not this case – that created 'fresh law.'" *Agostini*, 521 U.S. at 225. The precise

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[8]The decision below in effect creates a kind of "good faith exception" or "qualified immunity" defense to fees liability under §1988, based on defendants' reliance on subsequently overruled precedent. In addition to being contrary to *Harper*, such an approach directly conflicts with this Court's decisions holding that a defendant's good faith or bad faith is irrelevant for purposes of fee liability under 42 U.S.C. §1988. *Hutto v. Finney*, 437 U.S. 678, 693 (1978); *see also, e.g., Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 737-739 (1980) (State Bar Association not insulated from attorneys fees under section 1988, despite lack of fault). Unlike other fee-shifting statutes, section 1988 does not create an exception where the government's position was "substantially justified." (Contrast the Equal Access to Justice Act ("EAJA"), 28 U.S.C. section 2412, which does have such a provision). Section 1988 does not establish a fault-based standard, but an outcome-based standard. *See, e.g., Carhart*, 192 F.3d at 1152.

The lower courts' decision also carves an exception into this Court's decision in *Farrar*, which held that a plaintiff "prevails" when he or she obtains relief by judicial decree, order, or settlement with the defendant. 506 U.S. at 111. Here, petitioners obtained an enforceable consent decree enjoining the State of Minnesota from enforcing the state rule requiring local school districts to discriminate in the provision of special education benefits to children on the basis of religious school attendance. Plaintiffs went on to recover full relief against both school districts, one by settlement and one by permanent injunction. This satisfies *Farrar's* test for prevailing party status. The lower courts nonetheless denied fees, explicitly creating an exception to *Farrar* for the situation of "intervening and dispositive" precedent favorable to the plaintiff – precisely the circumstances for which *Harper* would seem to forbid creation of such an exception.

issue presented in *Agostini* was whether the substantial intervening changes that *had occurred* in the Supreme Court's cases interpreting the Establishment Clause justified, under Fed.R.Civ.P. 60(b)(5), relief from an ongoing injunction issued twelve years earlier in the *Aguilar* case. The Court answered yes, holding that the Court's decisions had already changed the governing interpretation of the Establishment Clause, and that it would be inequitable to continue the injunction under such circumstances – an approach consistent with *Harper's* premise that litigants in other pending matters (including a continuing injunction) should receive the full benefit of new controlling decisions.[9]

II. The Lower Courts are in Conflict Over the Effect of Intervening Favorable Precedent on Plaintiffs' Status as a Prevailing Party under the Fees Statute.

The lower federal courts are badly divided on the precise question decided by the Eighth Circuit: Whether, in an action under 42 U.S.C. §1983, intervening case law *favorable* to a plaintiff's position on an important legal issue defeats the plaintiff's entitlement to attorney fees under 42 U.S.C. §1988, where the plaintiff prevails in obtaining relief in part because of the new, favorable decision? The decision below directly

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[9]What evidently confused the lower courts was this Court's statement in *Agostini* that lower court judges must follow prior precedent unless and until overruled by this Court. 521 U.S. at 237. But it by no means follows from a *lower court's* obligation to follow this Court's judgments – a function of the hierarchy created by Article III – that *state officials* are excused from liability under 42 U.S.C. §1983 (including liability for attorneys fees) where, at the end of the day, their conduct is determined to have been a violation of plaintiffs' civil rights. That was the opinion of the courts below. That holding, however, is directly contrary to *Hutto v. Finney*, 437 U.S. at 693 (reasonableness or good faith not a defense to attorneys fees under §1988), and is a plain misuse of this Court's decision in *Agostini*.

conflicts with recent decisions of both the Fifth Circuit and the Sixth Circuit and with the leading decision of a prominent three-judge district court.

A. The Eighth Circuit's Decision Conflicts with the Fifth Circuit's Decision in *Associated Builders*.

The decision below directly conflicts with *Associated Builders & Contractors v. Orleans Parish School Board*, 919 F.2d 374 (5th Cir. 1990). In *Associated Builders*, plaintiffs challenged a school board's minority set-aside plan for construction contracts as unconstitutional. The defendant school board defended on the merits, but abandoned its defense once this Court decided *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), a significant new decision invalidating nearly all such set-aside or quota programs of state and local governments. Plaintiffs applied for fees under section 1988. Defendants argued that, though the goal of plaintiffs' lawsuit had been accomplished, it was *Croson* that led to its change in policy, not the lawsuit, and that plaintiffs therefore should not be awarded fees. *See* 919 F.2d at 378 ("The school board insists that the Supreme Court's decision in *Croson* [rather than the lawsuit] motivated its action.").

The Fifth Circuit rejected the argument, holding that the intervening, dispositive decision in *Croson* (which the Fifth Circuit termed "seminal," *id.* at 377) did not defeat the plaintiffs' entitlement to fees under §1988. *Id.* at 378. The Fifth Circuit noted the sequence of events – suit against the Orleans Parish school board, new decision in *Croson*, change of school board policy to settle the pending suit, in light of *Croson* – and concluded that plaintiffs' lawsuit was a "catalyst" to the defendants' action. *Id.* at 378. The Fifth

Circuit observed that defendants in such a position "'are usually rather reluctant to concede that the litigation prompted them to mend their ways.'" *Id.* (citations omitted). Neither good faith reliance on the uncertain state of the law prior to *Croson*, nor the fact that *Croson* had (so to speak) changed the law midstream, negated plaintiffs' entitlement to fees under §1988. The Fifth Circuit found it sufficient that plaintiffs had obtained the relief they sought, and that the settlement was in part prompted by the suit. *Id.*

The conflict with the decision below is clear. The Eighth Circuit held that an intervening favorable precedent deprives plaintiffs of prevailing party status or, alternatively, is a "special circumstance" justifying denial of fees, if defendants promptly change their position following the new decision. The Fifth Circuit in *Associated Builders* rejected such an approach – even where an intervening precedent was truly dispositive.

B. The Eighth Circuit's Decision Conflicts with the Sixth Circuit's Decisions in *Putnam* and *Perket*.

The decision below also conflicts with the Sixth Circuit's recent decisions in *Putnam v. Davies*, 149 F.3d 1184 (1998) (unpub. op.), *aff'g*, 960 F.Supp. 1268 (S.D. Ohio 1997), and *Perket v. Sec., HHS*, 905 F.2d 129 (1990). The plaintiffs in *Putnam* challenged an Ohio law authorizing seizure of an innocent owner's car if the driver was convicted of a second offense for drunken driving. While the suit was pending, the Ohio Supreme Court declared the law unconstitutional in a different case. The federal district court entered a declaratory judgment for plaintiffs on the basis of the

Ohio Supreme Court decision. Relying on the Sixth Circuit's seminal decision in *Perket, supra*,[10] the court then rejected the defendants' argument that the intervening decision deprived plaintiffs of prevailing party status under §1988:

> The fact that others were engaged in parallel efforts to declare the statute unconstitutional in the state courts and prevailed first does not detract from the effort of the attorneys in trying this case in federal court. Litigation such as this challenging the constitutionality of state statutes can take years, and parallel efforts in state and federal courts should not be discouraged. These parallel efforts would be strongly discouraged if one party's attorneys would be deprived of a statutory award of

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[10]*Perket* is the leading case for the proposition that intervening legal developments *favorable* to plaintiff cannot cut off his fee entitlement if he would have prevailed in any event. *See* 905 F.2d at 132-35. The Sixth Circuit also rejects the notion that a governmental defendant's good faith but erroneous belief that its actions were required by existing law excuses that defendant from fees liability. *City of Cleveland v. Nation of Islam*, 124 F.3d 196, 1997 WL 469533 (unpub.) (6th Cir. 1997), *cert. denied*, 118 S.Ct. 854 (1998).

> [T]he City urges that its good faith belief that it would violate sex discrimination laws if it leased the Convention Center to the Nation of Islam constitutes a special circumstance [justifying] relief from its §1988 responsibilities. Such an argument flies in the face of our prior decisions. We have previously held that a party's 'good faith' is not a special circumstance that justifies a denial of attorney's fees. *This rule applies even where a losing party, like the City, reasonably feels that its discriminatory actions were compelled by law.*" *Id.* at *2 (emphasis added; citations omitted).

> attorney's fees based merely on the fortuitous timing of the two court's judgments.

960 F.Supp. at 1273. The Sixth Circuit affirmed, rejecting defendants' argument (identical to the one made by the Eighth Circuit in this case, *see* 187 F.3d at 836, Pet. App. at 21) that the plaintiff obtained no relief not already required by the intervening favorable precedent. 149 F.3d 1184, 1998 WL 344075 at *4.

Again, the conflicts with the decision below are clear. The Sixth Circuit holds that fees should be awarded to a plaintiff who prevails because of intervening case law, even in the situation of parallel federal and state suits challenging the same statute. The Eighth Circuit here held that fees should be denied in such circumstances, even where only a ***common legal defense*** (here, the Establishment Clause) is raised by different defendants in different suits involving different challenges to different government programs or policies.[11]

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[11]The Ninth Circuit has taken an approach directly opposite to that of the Sixth Circuit, with respect to a case involving parallel state court and federal court litigation presenting the same claim against the same defendant. *Goehring v. Brophy*, 94 F.3d 1294 (9th Cir. 1996), *cert. denied*, 520 U.S. 1156 (1997). *Goehring*, relied on by the Eighth Circuit in the instant case (*see* 187 F.3d at 836; Pet. App. at 21), is in direct conflict with the Sixth Circuit's approach in both *Putnam* and *Perket*. There is thus a direct, two-on-two conflict among the circuits: The Ninth and (now) Eighth Circuits treat intervening favorable precedent in another case as (at least sometimes) defeating a §1983 plaintiff's status as a "prevailing party." The Fifth and Sixth Circuits explicitly reject that approach.

C. The Eighth Circuit's Decision Conflicts with the Decision of the Three-Judge Court in *Arkansas Community Organization.*

Arkansas Community Organization for Reform Now v. State Bd. of Optometry, 468 F.Supp. 1254 (E.D.Ark. 1979) (Henley, Circuit Judge, Eisele & Richard S. Arnold, District Judges) ("*ACORN*") is also directly contrary to the instant case. The underlying litigation in *ACORN* involved a constitutional challenge to a state statute prohibiting advertising by optometrists. The suit was filed prior to this Court's decisions in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) and *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), which recognized First Amendment protection for "commercial speech." Prior to these cases, the law did not generally recognize commercial speech as entitled to First Amendment protection. The decisions in *Virginia State Board* and *Bates* constituted significant new, intervening decisions "changing the law." In the wake of *Bates*, the governmental defendants in *ACORN* promptly agreed to a consent decree enjoining enforcement of the challenged regulation (just as Minnesota did here), but (also as here) resisted an award of attorneys fees under §1988 on the ground that they had acted in entire good faith and had moved with dispatch to settle the litigation as soon as it had become clear that they were in the wrong. The three-judge court rejected the argument and awarded fees. 468 F.Supp. at 1256. The court went on to reject the State's "good faith" and "change-in-caselaw" arguments:

> Nor is it relevant that the defendants acted in good faith in opposing the plaintiffs' complaint....

> Defendants' argument against the award of fees is, in essence, that they should not be required to bear the cost of the efforts of the plaintiffs' attorneys in light of the unsettled state of the law at the time of filing of the complaint, and in light of the dispatch with which the defendants moved toward settlement once the Supreme Court spoke definitively on the issue of professional advertising.... [citing *Bates* and *Virginia Board*]
>
> If the law is unsettled, the need for court action to clarify the law and to protect the interest of the plaintiffs may be greater, not less, than when the rights and duties of the parties are clear. The purpose of the Act is to ensure the enforcement of plaintiffs' rights, not to punish recalcitrant defendants. This purpose is served if fees are awarded to successful litigants in litigation which defines or redefines the law. *See Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 718 (5th Cir. 1974).

468 F.Supp. at 1257. The court rejected the idea that defendants could avoid liability for fees by changing their position "once their earlier position became untenable." *Id.* "[D]efendants' willingness to compromise a lawsuit already over a year old does not abrogate the plaintiffs' right to an award of attorney's fees." *Id.*

The decision below directly conflicts with *ACORN*. Here, as in *ACORN*, plaintiffs' lawsuit challenged existing precedent.[12] Here, as in *ACORN*, intervening new case law

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[12]Prior to *Agostini*, plaintiffs had argued that *Zobrest*, not *Aguilar*, was the case most directly on point to this matter involving provision of

vindicated plaintiffs' position on an important issue. (In *ACORN*, the new decision established the claim; here, *Agostini* repudiated a defense.) *ACORN* held that plaintiffs were to be encouraged to bring meritorious litigation challenging prior judicial interpretations and that intervening case law thus should not absolve a defendant of fees liability. *Id.* Here, the Eighth Circuit held that to award fees under such circumstances would unfairly punish the State's reliance on earlier case law and have the improper effect of encouraging litigation challenging such reliance. 187 F.3d at 837-38 (Pet. App. at 23-25).[13]

D. The Issue is of Recurring Importance and is Likely to Arise More Frequently as a Result of the Eighth Circuit's Decision in this Case.

The question of the effect of intervening case law on a plaintiff's entitlement to attorneys fees under §1988 has already arisen in several cases. The lower courts are all over the map (literally and figuratively) on the issue: The Fifth and Sixth circuits take one approach; the Ninth has taken another; the Eighth Circuit, in the decision below, has taken yet another, in direct conflict with that of the Fifth and Sixth but supported (in part, indirectly) by the approach of the Ninth Circuit. The result is cacophony and confusion.[14]

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on-premises special education services at religious schools pursuant to the IDEA (as was precisely the case in *Zobrest*). Plaintiffs argued that *Aguilar* was in any event distinguishable and that, to the extent the cases might appear in tension with one another, *Zobrest* was the more recent, authoritative, and directly pertinent case.

[13]The district court went so far as to suggest that plaintiffs should be denied fees because their suit challenged state policies that were not "*violations*" of section 1983 at all, because they were consistent with precedent at the time. *See* 18 F. Supp. 2d at 1020 (Pet. App. at 89).

[14]As noted above, the lower courts have also been divided over

Moreover, the specific issue presented here is likely to become *more* recurrent in light of the decision of the Eighth Circuit in this case. Prior to the Eighth Circuit's opinion, the cases were reasonably clear that an intervening precedent in a different case not involving a challenge to the same governmental action would provide no basis for a §1983 defendant to avoid fees liability, even if part (or all) of the reason for plaintiff's success was the new precedent. *Associated Builders*, *supra*; *Putnam*, *supra*; *ACORN*, *supra*. There was thus little or no incentive for a governmental defendant to resist payment of attorneys fees on such a theory. But if a governmental defendant may seize on new, adverse precedent as a ground for avoiding payment of attorneys fees in litigation, engaged in for months or even years, that now appears a lost cause, there doubtless will be many more cases in which the government claims an autonomous change-of-mind by virtue of "new" case law inconsistent with its position in some respect.

Consider, for example, the many cases now pending before this Court presenting unsettled questions of constitutional law. The Court's decisions this Term will provide significant "new law" on issues ranging from compulsory student activity fees at state universities (*Board of Regents v. Southworth*, No. 98-1189) to laws restricting speech outside abortion facilities (*Hill v. Colorado*, No. 98-1856) to topless dancing restrictions (*Erie, Pa. v. Pap's A.M.*, No. 98-1161) to government assistance to religious schools (*Mitchell v. Helms*, No. 98-1648), to laws banning partial-birth abortion (*Stenberg v. Carhart*, No. 99-830) to religious ceremonies preceding public school programs or events (*Santa Fe Independent School District v. Doe*, No. 99-62), to state

closely related causation questions in §1988 fee litigation ever since this Court's decision in *Farrar*. *See Laidlaw*, 120 S.Ct. at 711-12.

laws regulating private groups' membership practices (*Boy Scouts of America v. Dale*, No. 99-699), to state laws affecting parental rights (*Troxel v. Granville*, No. 99-0138).

Many of these same issues are, of course, presented in litigation challenging state action pending in other lower courts. (Indeed, that is often the reason this Court grants review of an issue.) If, in any of these cases, this Court invalidates government action analogous to government action challenged in a pending lower court case (or rules against an argument analogous to one made by a state in a pending case), the governmental defendants in the pending cases could, under the Eighth Circuit's theory, simply "decide" to change their conduct, citing the new case, and thereby excuse themselves from attorneys fees under §1988.

Given the monetary stakes sometimes involved in fees litigation in major constitutional cases, one can be reasonably certain that governmental defendants will at least *raise* the argument, in every situation in which it is reasonably possible. As the Fifth Circuit noted in *Associated Builders*, governmental defendants "'are usually rather reluctant to concede that the litigation prompted them to mend their ways.'" 919 F.2d at 378. *See also Fee for All: Citadel and ACLU Are At It Again – Now, It's Over Megabucks*, Wall Street Journal (Aug. 6, 1997) at A1 (fees litigation in case challenging constitutionality of state male-only military college, in aftermath of this Court's controlling decision in *United States Virginia*, 518 U.S. 515 (1996)). The incentive to make such a defense will be directly proportional to the likelihood that defendants will lose the litigation on the merits, either as a result of the new decision or because the case is going badly. The Eighth Circuit's remarkable "controlling intervening precedent" exception to §1988 encourages

strategic manipulation by governmental defendants: they may litigate to the hilt (here, for example, for nearly a year), defending an incorrect legal position, and then seize on the fortuity of a new *adverse* precedent that might afford a plausible ground for claiming an autonomous change of mind, thereby excusing themselves from fee liability. The Eighth Circuit's decision, left unreviewed, is thus likely to generate considerable mischief – quite apart from the extant conflict with the decisions of other circuits – in every circuit that has not already explicitly ruled to the contrary.

III. The Eighth Circuit's Opinion Conflicts with Ethical Rules and Professional Responsibilities Binding on Attorneys in 42 U.S.C. §1983 Litigation.

Perhaps the most disturbing aspect of the decision below is its holding that attorneys fees should be denied to a prevailing party if counsel does not cease pursuing meritorious claims on behalf of §1983 clients, when it appears that another pending case might result in precedent favorable to his or her client on a significant issue or defense. 187 F.3d at 837 (Pet. App. at 24) (inappropriate for counsel to "continue[] to litigate the matter and incur fees" if he believed *Agostini* would result in favorable precedent against the State's Establishment Clause defense).

With all due respect to the court below, this is little short of outrageous. We cannot believe the Eighth Circuit intended to suggest, in direct conflict with ethics rules, that an attorney should not vigorously and zealously pursue his clients' cause, because he believes intervening case law may *improve* his clients' position! Counsel had an ethical duty to aggressively pursue the case. Model Rules of Professional

Conduct 1.3, Comment. It is unthinkable that counsel should have failed to press the cause of these children with disabilities – forced out of their religious schools by virtue of the State's policy of denying needed special education services to children attending religious schools – when each day continued the legal injury. As it was, Aaron Westendorp and Sarah Peter were forced out of their schools for three and two years, respectively. To suggest that counsel should have sat on their hands, withdrawn motions argued months before certiorari was granted in *Agostini*, failed to pursue discovery in the month before *Agostini* was decided, and not move for relief in time for the 1997-98 school year, is simply unconscionable.

The Eighth Circuit's rule would set a lower ethical standard of zealous representation for lawyers representing clients challenging unlawful state government actions, on pain of forfeiture of statutory attorneys fees. This extraordinary holding itself warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

AARON WESTENDORP,
A Minor with Disabilities, et al.,

Petitioners,

-versus-

JESSE "THE BODY" VENTURA, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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Appendix

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THE DECISIONS BELOW

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THE ATTORNEYS FEES DECISIONS BELOW

(Reverse Chronological Order)

Decision for Which Certiorari Review is Sought:

187 F.3d 829
137 Ed. Law Rep. 874
(Cite as: 187 F.3d 829)
<KeyCite History>

Joan **PETER**; Sarah Peter, a minor, by and through her parent and natural guardian Joan Peter; Krista Westendorp; Douglas Westendorp; Aaron Westendorp, a minor, by and through his parents and natural guardians Krista Westendorp and Douglas Westendorp, Appellants,

v.

Christine **JAX**, Commissioner of Minnesota Department of Children, Families and Learning; Jesse Ventura, Governor, State of Minnesota; Independent School District, No. 877, Buffalo, Minnesota; Independent School District, No. 273, Edina, Minnesota. Appellees.

No. 98-3268.
United States Court of Appeals,
Eighth Circuit.
Submitted: April 22, 1999.

Filed: Aug. 13, 1999.
As Amended: Sept. 20, 1999.
Rehearing and Rehearing En Banc Denied Sept. 30, 1999. [FN*]

FN* Judge McMillian and Judge Richard S. Arnold would grant the petition.

Following entry of consent injunction and stipulation in disabled students' action against state and school districts under §1983, students filed application for award of $272,494.80 in attorney fees and expenses against state pursuant to §1988. The United States District Court for the District of Minnesota, John M. Mason, United States Magistrate Judge, dismissed application, and students appealed. The Court of Appeals, Ross, Circuit Judge, held that: (1) entry of consent injunction and stipulation did not make students prevailing parties entitled to attorney fee award, and (2) circumstances of resolution of students' claims amounted to special circumstances rendering award of attorney fees unjust.

Affirmed.

[1] FEDERAL COURTS k830
170Bk830
Court of Appeals reviews district court's denial of fees under §1988 for abuse of discretion. 42 U.S.C.A. §1988(b).

[2] CIVIL RIGHTS k296
78k296
Rule that plaintiff must obtain some relief on merits of his claim against defendant from whom fees are sought, either through enforceable judgment or comparable relief, rather than catalyst theory, was applicable to determination of disabled students' entitlement to attorney fees and expenses pursuant to §1988 in their action against state and school districts under §1983. 42 U.S.C.A. §§1983, 1988(b).

[3] CIVIL RIGHTS k296
78k296
Entry of consent injunction and stipulation in disabled students' action against state and school districts under §1983 did not make students "prevailing parties" entitled to attorney fee award pursuant to §1988, even though injunction and stipulation afforded students relief on merits of their claims; state changed its position on issues presented prior to entry of injunction and stipulation as result of intervening decision of United States Supreme Court, students received no direct benefit from entry of injunction and stipulation and no relief which was not mandated by intervening decision, and action presented only legal questions. 42 U.S.C.A. §§1983, 1988. See publication Words and Phrases for other judicial constructions and definitions.

[4] CIVIL RIGHTS k305
78k305
Whether causal link existed between party's bringing lawsuit and final result of litigation, as required to justify award of attorney fees under §1988, is question of fact, reviewed under clearly erroneous standard. 42 U.S.C.A. §1988.

[4] FEDERAL COURTS k878
170Bk878
Whether causal link existed between party's bringing lawsuit and final result of litigation, as required to justify award of attorney fees under §1988, is question of fact, reviewed under clearly erroneous standard. 42 U.S.C.A. §1988.

[5] CIVIL RIGHTS k296
78k296
As general rule, when party settles with government authorities following commencement of citizen suit, it is permissible to infer that citizen suit motivated settlement, for purposes of attorney fee award under §1988. 42 U.S.C.A. §1988.

[6] CIVIL RIGHTS k296
78k296
Entry of consent injunction and stipulation in disabled students' action against state and school districts under §1983, in which state agreed to cease enforcement of rule prohibiting provision of special education services

in religious schools, did not directly benefit plaintiff students, as required element of prevailing party status for purposes of attorney fee award under §1988; students sought change in rule and provision of services, only state school board, a nonparty, could change rule, and only school districts could provide requested services. 42 U.S.C.A. §§1983, 1988; Minn.Rule 3525.1150.

[7] CIVIL RIGHTS k296
78k296
Although prevailing parties in actions under §1983 should ordinarily recover attorney's fee pursuant to §1988, district court has discretion to deny award where special circumstances would render such award unjust. 42 U.S.C.A. §§1983, 1988.

[8] CIVIL RIGHTS k297
78k297
Defendant's good faith alone is not "special circumstance" sufficient to justify denial of fees to which prevailing plaintiff would otherwise be entitled under §1988. 42 U.S.C.A. §1988. See publication Words and Phrases for other judicial constructions and definitions.

[9] CIVIL RIGHTS k293
78k293
Circumstances of resolution of disabled students' §1983 action against state, taken together, amounted to

special circumstances rendering award of attorney fees pursuant to §1988 unjust; state was required to enforce challenged rule prior to entry of consent injunction and stipulation and stopped doing so immediately after Supreme Court decision in conflict therewith, students' counsel was aware that Supreme Court decision likely to be dispositive was imminent but continued to litigate, fee request included $75,000 for fee litigation, and actual relief sought by students was independent of state's position on enforcement of rule. 42 U.S.C.A. §§1983, 1988; Minn.Rule 3525.1150.

[10] CIVIL RIGHTS k302
78k302
Party in civil rights action is not entitled needlessly to accumulate exorbitant legal fees with expectation that losing party will be called upon to pick up entire tab.

*831 J. Matthew Szymanski, McLean, Virginia, argued (Michael Stokes Paulsen, Minneapolis, Minnesota, on the brief), for Appellants.

Steven B. Liss, St. Paul, Minnesota, argued (Hubert H. Humphrey, III, Attorney General for the State of Minnesota, on the brief), for Appellees.

Before BOWMAN, Chief Judge, ROSS and MAGILL, Circuit Judges.

ROSS, Circuit Judge.

Disabled students, Sarah Peter and Aaron Westendorp, and their parents (appellants) appeal from an order of the district court[1] denying them attorney's fees under 42 U.S.C. §1988 against the Governor of Minnesota and the Commissioner of the Department of Children, Families and Learning (the State). *Peter v. Wedl*, 18 F.Supp.2d 1002 (D.Minn. 1998). We affirm.

BACKGROUND

Some of the background of this litigation is set forth in *Peter v. Wedl*, 155 F.3d 992 (8th Cir. 1998). Relevant to this fee dispute is the following. In July 1996, appellants brought an action under 42 U.S.C. §1983 against their school districts and the State, alleging that Minn. R. 3525.1150 (the rule) barred provision of on-site paraprofessional services at religious schools in violation of their rights to free speech, free exercise of religion, and equal protection under the First and Fourteenth Amendments, as well as under the Individuals with Disabilities Education Act (IDEA), 20 U.S .C. §§1400-1491o (1994) and state law. The rule required that school districts provide special education services "at a neutral site," which

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[1]The Honorable John M. Mason, United States Magistrate Judge for the District of Minnesota, to whom this matter was referred for submission by consent of the parties under 28 U.S.C. §636(c). Because another matter is pending in the district court, the court entered its order pursuant to Fed.R.Civ.P. 54(b), thus making it appealable.

included nonreligious private schools, but not religious schools. *See* Minn.Stat. §123.932, subd. 9.

Appellants filed a motion for a preliminary injunction enjoining enforcement of the rule, relying on, among other cases, *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 113 S.Ct. 2462, 125 L.Ed.2d 1 (1993). In *Zobrest*, the Supreme Court held that the Establishment Clause did not ***832** bar a school district from providing a student with a sign-language interpreter at a religious school. The State opposed the motion and moved to dismiss, relying on, among other cases, *Aguilar v. Felton*, 473 U.S. 402, 105 S.Ct. 3232, 87 L.Ed.2d 290 (1985), in which the Supreme Court held that the Establishment Clause barred public school teachers from providing remedial education services in a religious school. The school districts also filed various motions.

In March 1997, the district court denied injunctive relief, granted in part and denied in part appellees' motions to dismiss, and granted a motion for summary judgment against appellants on their IDEA claims. *Peter v. Johnson*, 958 F.Supp. 1383, 1400 (D.Minn. 1997), *rev'd in part, Peter v. Wedl*, 155 F.3d at 1002.

On June 23, 1997, the Supreme Court decided *Agostini v. Felton*, 521 U.S. 203, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997). In *Agostini*, the Court expressly

overruled Aguilar and held that the Establishment Clause did not bar provision of publicly-funded remedial services at religious schools.

On June 24, 1997, the State wrote appellants' counsel, proposing putting the litigation "on hold" until June 27 while it reviewed *Agostini*. However, on June 26, appellants brought a new motion for preliminary injunction based on *Agostini*. Later that day, the State faxed a letter to appellants expressing surprise on receiving the motion in light of its June 24 letter. The State also advised appellants that after review of *Agostini* the Commissioner no longer intended to "enforce Minn. R. 3525.1150 to prevent school districts from providing special education services on-site at sectarian schools." The State indicated it would work with the state board of education to repeal the rule to the extent it was inconsistent with *Agostini*, but noted that school districts retained the discretion to determine whether to provide special education services at private schools. In letters of July 11 and 22, the State reiterated its position that "because of *Agostini*, the State will no longer enforce the rule as limited to neutral sites" and that the school districts had the responsibility for provision of special education services. In its July 11 letter, the State also advised appellants that only the state board of education had the authority to change the rule and the Commissioner could not "dictate the

outcome of the rulemaking process," which could take several months.

On July 31, 1997, appellants and the State stipulated to entry of a preliminary injunction. On August 5, the court entered a preliminary injunction enjoining enforcement of the rule "insofar as it prohibits provision of special education services to Plaintiffs Sarah Peter and Aaron Westendorp on the premises of a private religious school." In October 1997, the state school board changed the rule so that it no longer prohibited provision of special education services at religious schools, explaining the change was necessary to comply with *Agostini*. The district court then dismissed the claims against the State as moot.

In September 1997, the Peters entered into a settlement agreement with their school district in which the district agreed to rescind policies that prohibited provision of paraprofessional services at religious schools and to pay $31,000, which included attorney's fees. However, the Westendorps' school district refused to provide such services, maintaining it did not provide the services at any private school. The Westendorps then moved for a preliminary injunction requiring the school district to provide paraprofessional services at a religious school. The district court thereafter denied injunctive relief and granted summary judgment against the Westendorps' remaining

constitutional and state law claims against the district, and they appealed.

While the Westendorps' appeal was pending, appellants filed an application in the district court for attorney's fees *833 against the State under 42 U.S.C. §1988,[2] seeking $272,494.80 in fees and expenses, including over $62,000 for fee litigation. Appellants contended they were prevailing parties under *Farrar v. Hobby*, 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992), because they obtained relief on the merits of their claim against the State. In the alternative, appellants contended they were prevailing parties because their lawsuit was the catalyst for the change in the State's position.

The district court denied the fee application. The court held that appellants were not prevailing parties under *Farrar* because the relief obtained by the consent injunction and stipulation did not materially benefit them, as *Farrar* required, noting it was the school district's responsibility to provide the requested paraprofessional services. *See id.* at 111, 113 S.Ct. 566. The court also held that appellants were not prevailing parties under a catalyst theory of recovery,

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[2]A "district court retains jurisdiction over collateral matters, such as attorney's fees..., while an appeal is pending." *Missouri v. Coeur D'Alene Tribe*, 164 F.3d 1102, 1107 n.3 (8th Cir.), *cert. denied*, ___ U.S. ___, 119 S.Ct. 2400, ___ L.Ed.2d ___ (1999).

finding that the State changed its position because of *Agostini*, not because of the lawsuit. In any event, the court concluded even if appellants were prevailing parties, it would deny attorney's fees because of special circumstances, including that until the Supreme Court's decision in *Agostini*, the State was obligated to follow *Aguilar*.

DISCUSSION

[1] Under 42 U.S.C. §1988(b), a district "court, in its discretion, may allow the prevailing party ... a reasonable attorney's fee as part of the costs." We review the denial of fees for an abuse of discretion. *Jenkins v. Missouri*, 127 F.3d 709, 713 (8th Cir. 1997) (*en banc*). However, "the question of prevailing party status, a statutory term, presents a legal issue for decision, which we review de novo." *Id.* at 713-14.

[2] In the district court, the parties disputed whether *Farrar* or the catalyst theory should apply to determine prevailing party status. Under *Farrar*, a plaintiff must obtain "some relief on the merits of his claim ... against the defendant from whom fees are sought," either through an enforceable judgment or comparable relief. *Farrar*, 506 U.S. at 111, 113 S.Ct. 566. The catalyst theory is an "alternative to the *Farrar* approach in cases where the defendant voluntarily granted the requested relief, rendering the lawsuit moot[,]" if the lawsuit was the cause of the remedial action and defendant's compliance was not

gratuitous. *Tyler v. Corner Constr. Corp.*, 167 F.3d 1202, 1205 (8th Cir. 1999). In *Tyler*, this court, noting some confusion in our cases, held that courts should apply "the principles outlined in *Farrar* to determine prevailing-party status in cases that result in settlement." *Id.* In light of *Tyler*, the parties concede, and we agree, that the *Farrar* principles are applicable.

[3] We turn now to those principles. Appellants argue the consent injunction and stipulation automatically make them prevailing parties under *Farrar*. We disagree. Although under *Farrar*, a plaintiff must obtain relief on the merits through an enforceable judgment, a consent decree, or a settlement, that is not enough. In addition, the relief must "materially alter [] the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Farrar*, 506 U.S. at 111-12, 113 S.Ct. 566. The Court also emphasized "[w]hatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement." *Id.* at 111, 113 S.Ct. 566. The Court explained that it is "[o]nly under these circumstances can civil rights litigation effect 'the material alteration of the legal relationship of the parties' and thereby transform the plaintiff into a prevailing party." *Id.* (quoting *Texas State Teachers Ass'n. v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792-93, 109 S.Ct. 1486, ***834** 103 L.Ed.2d 866 (1989)). "Otherwise the judgment or settlement cannot be said to 'affec[t] the

behavior of the defendant toward the plaintiff.'" *Id.* (quoting *Rhodes v. Stewart*, 488 U.S. 1, 4, 109 S.Ct. 202, 102 L.Ed.2d 1 (1988) (*per curiam*)).

Thus, as we read *Farrar*, the civil rights litigation, not some other reason, must be the cause for the change in a defendant's behavior. In other words, under *Farrar*, not only must the plaintiff "have obtained relief through a judgment or settlement[,]" but also the "lawsuit [must] be a catalyst of legal change favorable to the plaintiff." *Board of Educ. v. Steven L.*, 89 F.3d 464, 469 (7th Cir. 1996), *cert. denied*, 520 U.S. 1198, 117 S.Ct. 1556, 137 L.Ed.2d 704 (1997); *see also New Hampshire v. Adams*, 159 F.3d 680, 684 (1st Cir. 1998) ("fee-seeker [must] show both materiality and causation as prerequisites to achieving prevailing party status"); *Statewide Reapportionment Advisory Comm. v. Beasley*, 99 F.3d 134, 137 (4th Cir. 1996) (*en banc*) ("To be a prevailing party in a legal action, a party must obtain relief in the action on the merits of his claim, and not from some other process.") (Niemeyer, J., concurring), *cert. denied*, 520 U.S. 1166, 117 S.Ct. 1427, 137 L.Ed.2d 536 (1997) (internal citation omitted).

[4] In determining whether a party prevails because of a lawsuit or because of some other reason, this court has rejected a "but for" test of causation. *Truax v. Bowen*, 842 F.2d 995, 997 (8th Cir. 1988)

("although it is true that had [claimant] not filed his lawsuit he would not have obtained relief, we fail to see how this 'but for' argument establishes a causal connection between the litigation and ... remedial action"); *see also Steven L.*, 89 F.3d at 469 (to determine prevailing-party status "'[b]ut for' is not an adequate conception of cause"); *Brown v. Griggsville Community Unit Sch. Dist. No. 4*, 12 F.3d 681, 685 (7th Cir. 1993) (plaintiffs were not prevailing parties where school "board changed its mind for reasons unrelated to the legal proceeding (except in the 'but for' sense")). Rather, "a proper concept of causation requires more, requires that the putative cause also have made the consequence more likely to occur." *Id.* "Whether such a causal link existed is a question of fact[,]" which we review under the clearly erroneous standard. *Shipman v. Missouri Dept. of Family Serv.*, 877 F.2d 678, 682 (8th Cir. 1989), *cert. denied*, 493 U.S. 1045, 110 S.Ct. 842, 107 L.Ed.2d 837 (1990).

[5] We agree with appellants that as a general rule when a party "settles with government authorities following the commencement of a citizen suit, it is permissible to infer that the citizen suit motivated the settlement." *Armstrong v. ASARCO, Inc.*, 138 F.3d 382, 387 (8th Cir. 1998).[3] However, in this case,

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[3]"A fee-seeker who aspires to prevailing party status may make the requisite showing of causation by ... win[ning] the litigation." *Adams*, 159 F.3d at 684 (internal quotation omitted).

because of the intervening and dispositive *Agostini* decision, we do not believe the general rule is applicable. In this case, the district court's finding that the State changed its position on enforcement of the rule because of *Agostini*, and not because of appellants' lawsuit, is supported by the record and thus not clearly erroneous. Before the Supreme Court's decision in *Agostini*, the State did not waiver in its position that the case was controlled by *Aguilar*. On June 24, the day after *Agostini* was decided, the State asked appellants to put the litigation on hold for three days while it considered the implications of the decision. On June 26, the State wrote appellants that in light of Agostini the commissioner would "no longer enforce Minn. R. 3525.1150 to prevent school districts from providing special education services on-site at sectarian schools and would take action to repeal the rule to the extent it was inconsistent with *Agostini*." The State reiterated its position in letters of July 11 and 22. On July 31 appellants and the State stipulated to *835 entry of the injunction enjoining enforcement of the rule to the extent it was inconsistent with *Agostini*. On August 5, the court enjoined the State from "enforcing Rule 3525.1150 insofar as it prohibits provision of special education services to Plaintiffs Sarah Peter and Aaron Westendorp on the premises of a private religious school."

The chronology amply supports the district court's finding that it was *Agostini*, not the litigation,

that caused the State to change its position on enforcement of the rule. Indeed, this court recognized that the State "abandoned [its Establishment Clause] argument following the Supreme Court's decision in *Agostini*," and "[f]ollowing this decision," stipulated to entry of an injunction. *Peter*, 155 F.3d at 995, 997. Put another way, because at the time the stipulation and injunction were entered, the State was no longer enforcing the rule the documents did not "materially alter[] the legal relationship between the parties." *Farrar*, 506 U.S. at 111, 113 S.Ct. 566. *See Martinez v. Wilson*, 32 F.3d 1415, 1423 (9th Cir. 1994) (party did not prevail because "the behavior enjoined was not occurring at the time the injunction issued, nor was there any imminent threat of its occurrence"). In addition, the Supreme Court has explained that "[w]here the plaintiff's success on a legal claim can be characterized as purely technical," the plaintiff would not be a prevailing party. *Garland*, 489 U.S. at 792, 109 S.Ct. 1486. After *Agostini* was decided, it seems to us the entry of the stipulated injunction was at most a technical success, which would not entitle appellants to attorney's fees.

We have considered appellants' argument that "*Agostini* was the state defendants' ultimate cover to concede a lost cause in a way that avoided certain

judicial defeat ... and attorney ... fee liability."[4] Appellants assert that their discovery materials "influenced [the State's] decision to swiftly settle, agree to the injunction, and conclude the litigation as it did." We disagree. Appellants claim their "most important discovery" was the deposition of Penny Kodrich, director of special services for the Westendorps' school district, in which she stated the rule prevented the district from providing special services to Aaron at a religious school--which is what

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[4]Appellants also argue they are prevailing parties under an "inevitable victory" theory of recovery, asserting even if not for *Agostini*, they would have won. We have never expressly recognized such a theory and refuse to do so now. "The [Supreme] Court has repeatedly warned against permitting fee disputes to 'spawn a second litigation of significant dimension.'" *Guglietti v. Secretary of Health and Human Serv.*, 900 F.2d 397, 403 (1st Cir. 1990) (quoting *Garland*, 489 U.S. at 791, 109 S.Ct. 1486). Appellants' proposed theory would "require [] nothing less than the hypothetical relitigation of cases which, because of [an intervening event], need not be litigated at all." *Id.* In addition, we note that although this court recognized that in light of *Zobrest*, the State's Establishment Clause defense "was highly questionable," *Peter*, 155 F.3d at 997, in *Agostini*, the Supreme Court warned lower courts not to conclude that "more recent cases have, by implication, overruled an earlier precedent." 521 U.S. at 237, 117 S.Ct. 1997.

the rule did. In any event, the deposition was taken on July 17, after the State announced that the rule would no longer be enforced to the extent it was inconsistent with Agostini, and thus could not have influenced the State's decision.

Appellants also claim the May 12, 1997 deposition of Wayne Erickson, the manager of the state department of special education services, was a "turning point." They note that this court quoted Erickson's deposition testimony that it was "the state's policy" to provide special education services in the classroom of a nonreligious private school. *Peter*, 155 F.3d at 995. However, as the State maintained throughout the litigation, in his testimony Erickson made clear that the "school district makes the determination as to whether an individual student is entitled to services," and if so, "to determine where those services are provided." As the district court *836 found, there is nothing in the record to suggest that the State changed its position on enforcement of the rule in response to Erickson's testimony. To the contrary, the record shows that until the Supreme Court decided *Agostini*, the State was actively litigating the case. Indeed, in a July 11 letter the State informed appellants because of "the likely resolution of this matter under *Agostini*, the State Defendants will not be responding to your Motion in Support of a Preliminary Injunction or attending depositions, and we do not expect you to respond to our pending discovery requests."

Also, and importantly, as the district court noted, resolution of whether the rule was defensible under the Establishment Clause was not dependent upon factual issues, as was the equal protection claim against the Westendorps' school district, *see Peter*, 155 F.3d at 997 (remand for factual determination of basis for denial of special services),[5] but was a legal question. Indeed, in a July 2 letter appellants wrote the State that as they read *Agostini* it was "a complete acceptance of our position that Rule 3525.1150 ... is not justified by the Establishment Clause." As this court recognized, after *Agostini*, the rule could no longer "be justified as a narrowly tailored means of avoiding a violation of the Establishment Clause." *Peter*, 155 F.3d at 997.

Moreover, consideration of the relief-obtained prong of *Farrar* shows that any relief obtained was the result of *Agostini*, not the litigation. In their June 26 motion for injunctive relief, appellants asked that the court require "defendants to provide special education services to plaintiff Aaron Westendorp" at a religious school. However, the injunction only enjoined enforcement of the rule "insofar as it prohibits provision of special education services ... on the premises of a private religious school." It did not mandate a change in the rule or require provision of the requested paraprofessional services at religious

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[5]On remand the Westendorps abandoned their equal protection claim. *See infra* at 17.

schools. It merely memorialized the Commissioner's previously announced decision that the rule would not be enforced in light of *Agostini*. Thus, appellants "did not receive any relief which was not mandated by" *Agostini*. *Goehring v. Brophy*, 94 F.3d 1294, 1304 (9th Cir. 1996), *cert denied*, 520 U.S. 1156, 117 S.Ct. 1335, 137 L.Ed.2d 495, *overruled on other grounds, City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997).

In fact, this case is very similar to *Goehring*. In that case, plaintiffs filed a §1983 action in federal district court alleging that a state university's policy of using student fees to fund political and religious organizations violated their First Amendment rights. After, in another case, the state supreme court held that the policy was unconstitutional and the United States Supreme Court denied *certiorari*, the university revised its policy to conform to the state supreme court's decision. Plaintiffs then filed a motion for attorney's fees under §1988, which the district court denied. The Ninth Circuit upheld the denial, holding that plaintiffs were not prevailing parties because the university revised its policy in response to the denial of *certiorari* and not the lawsuit.

[6] The State also argues because the injunction did not require a rule change or provision of services, it did not "directly benefit" appellants, as *Farrar* requires. *See Farrar*, 506 U.S. at 111, 113 S.Ct. 566

("Whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement."). The State notes only the state school board, a nonparty, could change the rule and only the school districts could provide the requested paraprofessional services. Appellants argue they benefited because the stipulation and injunction caused the State to "immediately ceas[e] the invidious discrimination of the rule." They rely on *Jacobson v. City of Coates*, 171 F.3d 1162, 1163 (8th Cir. 1999) (*per curiam*), in which this court held that appellants were prevailing *837 parties because a judicial determination that an ordinance "was unconstitutional changed the legal relationship between appellants and the City." However, this court has also stated that "'a judicial pronouncement that the defendant has violated the Constitution,'" without more, does not make a plaintiff a prevailing party. *Pedigo v. P.A.M. Transport, Inc.*, 98 F.3d 396, 398 (8th Cir. 1996) (quoting *Farrar*, 506 U.S. at 112, 113 S.Ct. 566). *See also Cady v. City of Chicago*, 43 F.3d 326, 330 (7th Cir. 1994) ("unless [plaintiff] can point to a direct benefit ... other than the 'psychic satisfaction' of ending 'invidious discrimination,' he does not emerge as a prevailing party"). *But see Dambrot v. Central Michigan Univ.*, 55 F.3d 1177, 1192 (6th Cir. 1995) ("vindication of [constitutional rights] ... constitutes relief such that Plaintiffs should be deemed prevailing parties"). Because we hold that the lawsuit did not cause the State to change its position on enforcement of

the rule, we do not decide whether nonenforcement of the rule is a "direct benefit" under *Farrar*.

[7][8] In any event, even if appellants were prevailing parties, we agree with the district court that they would not be entitled to fees because of special circumstances. Although prevailing parties "'should ordinarily recover an attorney's fee,'" a district court has discretion to deny an award where "'special circumstances would render such an award unjust.'" *Hatfield v. Hayes*, 877 F.2d 717, 719 (8th Cir. 1989) (quoting *Newman v. Piggie Park Enter., Inc.*, 390 U.S. 400, 402, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968)). "Because the language of §1988 does not include the 'special circumstances' exception, this judicially created exception should be narrowly construed." *Id.* at 720. In addition, as the district court noted, a defendant's good faith alone is not a special circumstance sufficient to justify a denial of fees. *See Yankton Sch. Dist. v. Schramm*, 93 F.3d 1369, 1377 (8th Cir. 1996).

[9] However, in this case, we believe "the following reasons, all of which, taken together, amount to special circumstances that would make [a fee] award unjust." *Little Rock Sch. Dist. v. Arkansas State Bd. Of Educ.*, 928 F.2d 248, 249 (8th Cir. 1991) (order); *see also Thorsted v. Munro*, 75 F.3d 454, 456 (9th Cir. 1996) (order) (although "several of the circumstances identified by the district court [including defendant's

good faith] would be insufficient, standing alone, to warrant a denial of fees ... court did not abuse its discretion by denying fees based on the totality of the circumstances"). First, as the district court noted, until the Supreme Court's decision in *Agostini*, the State had no choice but to follow *Aguilar*, even though it might have been undermined by *Zobrest*. *See Agostini*, 521 U.S. at 237, 117 S.Ct. 1997 (lower courts should not "conclude [Supreme Court's] more recent cases have, by implication, overruled an earlier precedent"). Within two days of the *Agostini* ruling, the Commissioner concluded the rule would no longer be enforced to the extent it conflicted with *Agostini*. *See Chastang v. Flynn & Emrich Co.*, 541 F.2d 1040, 1045 (4th Cir. 1976) (special circumstances justified denial of fees because company acted "with reasonable dispatch" to bring retirement plan in compliance with law "as soon as a murky area of the law was clarified ... and from the chronology of events we cannot infer that plaintiffs' law suits were a contributing factor").

Moreover, as the district court noted, appellants' counsel was aware that the Supreme Court would likely decide Agostini by June 1997 and believed it would be dispositive, but continued to litigate the matter and incur fees. In fact, one of appellants' counsel, who seeks reimbursement for over 773 hours at $300 an hour, filed an *amicus brief* in *Agostini* and was "confident" the outcome would support his position. As the First Circuit has stated,

"[t]he prevailing party requirement is an incentive mechanism designed to encourage prompt resolution of meritorious *838 claims and to discourage unnecessary litigation." *Adams*, 159 F.3d at 687. "This policy rationale ... is served by declining to award fees when litigation yields only relief that in all probability was attainable without the time and expense of adversarial proceedings." *Id. Cf. Oxford House-A v. City of University City*, 87 F.3d 1022, 1024 (8th Cir. 1996) (plaintiff was not prevailing party where timing of lawsuit was "unreasonable" because plaintiff obtained same relief in administrative proceedings).

In similar circumstances, the Seventh Circuit has held that the district court did not abuse its discretion in denying a fee request. In *Brown v. Stackler*, 612 F.2d 1057, 1058 (7th Cir. 1980), the "complaint raised an issue which everyone knew would be controlled" by a pending Supreme Court case. After the Supreme Court's ruling, which was favorable for plaintiffs, the district court entered judgment for plaintiffs, who then submitted a fee request claiming 800 hours. The Seventh Circuit found no abuse of discretion in the denial of fees, noting "it was utterly unreasonable to expend that amount of time on a ... case, which would almost automatically be disposed of by the decision [of the Supreme Court] whose determination was being awaited." *Id.* at 1059.

[10] Indeed, this court has stated that a party in a civil rights action "is not entitled needlessly to accumulate exorbitant legal fees with the expectation that the losing party will be called upon to pick up the entire tab." *Planned Parenthood of Minnesota v. Citizens For Community Action*, 558 F.2d 861, 871 (8th Cir. 1977). We note that after *Agostini*, appellants had offered to "stop the meter" on fees if the State agreed to their demands. We remind appellants that "[a]n award of attorney's fees is compensatory, not punitive, and we will not allow a threat of paying the opposing party's unreasonable legal fees to chill" the assertion of a defense of a claim. *Id. See also Jaquette v. Black Hawk County*, 710 F.2d 455, 463 (8th Cir. 1983) (fee awards "should not serve as a vehicle to charge exorbitant fees and such excessive fees should not act to chill good faith defenses to claims brought under the Civil Rights Act").

We also note that appellants, who have hired a so-called "fee-litigation specialist," in their application claimed over $62,000 for district court fee litigation, but now inform this court that the amount has grown to $75,000, and if successful in this court would, of course, seek fees for the appeal. Although appellants claim that $75,000 for fee litigation against the State in the district court is reasonable, we believe the amount is excessive. We remind appellants of the Supreme Court's admonition that "[a] request for attorney's fees should not result in a second major litigation." *Hensley*

v. Eckerhart, 461 U.S. 424, 437, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983).

In addition, appellants are "'[a]pparently unmindful of the Supreme Court's admonition that fee awards are not intended to 'produce windfalls to attorneys.'" *St. Louis Fire Fighters Ass'n. v. City of St. Louis*, 96 F.3d 323, 332 n.9 (8th Cir. 1996) (quoting *Riverside v. Rivera*, 477 U.S. 561, 580, 106 S.Ct. 2686, 91 L.Ed.2d 466 (1986)). This court has held that "special circumstances ma[d]e a fee award unjust" against a defendant who "did only what it reasonably believed was compelled by state law," because awards against other defendants, who had a "much more direct connection" to constitutional violations, "fully compensate[d] the plaintiff to the extent required by law." *Rose v. State of Nebraska*, 748 F.2d 1258, 1264 (8th Cir. 1984), *cert. denied*, 474 U.S. 817, 106 S.Ct. 61, 88 L.Ed.2d 50 (1985); *see also Little Rock Sch. Dist.*, 928 F.2d at 249 (court denied fees because plaintiffs had been "well compensated" by fee awards against other parties). In this case, the State points out the Peters have received $31,000 from their school district, which includes attorney's fees, and the Westendorps' fee petition requesting apparently over $60,000 against their school district is pending in the district ***839** court.[6] Relying

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[6]The district court stayed ruling on attorney's

Continued on next page...

on *Rose*, the State argues an award of fees against it would be unjust because it was the responsibility of the school districts to provide the requested paraprofessional services and that provision of such services was the actual relief appellants sought and was independent of the State's position on enforcement of the rule.

We agree and believe the Westendorps' litigation proves the point. After the State decided not to enforce the rule, their school district still refused to provide paraprofessional services in a religious school, maintaining it did not provide such services in any private school. In our previous appeal, we reversed the district court's grant of summary judgment on the Westendorps' equal protection claim and remanded "for a factual determination of whether [the school district] based its denial of services ... on its purported religion-neutral policy, or if its denial was based on the religious animus contained in Minnesota Rule 3525.1150." *Peter*, 155 F.3d at 998. In addition, we reversed the district court's grant of summary judgment on their IDEA claim, but only as to violations before the 1997 Amendments to the IDEA,

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[6] Continued from previous page...

fee issues pending the decision in this appeal. We note we had remanded for the district court's consideration the Westendorps' request for over $67,000 in fees in connection with their previous appeal.

which made clear a school district was not required to provide special education services in a private school if a student received the services in a public school. *Id.* We left the proper relief for the past violations to the discretion of the district court. *Id.* at 1001.

On remand, the district court, as equitable relief for the past IDEA violations, ordered the school district "to provide a classroom paraprofessional aide to Aaron Westendorp at the school chosen by his parents, whether public or private (including religious), for the equivalent of six academic years" and also ordered the school district to pay $1 in stipulated damages. *Westendorp v. Indep. Sch. Dist. No 273*, 35 F.Supp.2d 1134, 1138 (D.Minn. 1998). The Westendorps then requested that the district court enter final judgment, representing that the relief obtained on their IDEA claim provided "all the relief they have sought in this case" and it was thus unnecessary for the court to address their constitutional claim, which implicated the State's enforcement of the rule. The State did not object, and the court entered final judgment on the IDEA claim without resolving the constitutional claim. Because resolution of a constitutional claim involving the State's enforcement of the rule was unnecessary to Aaron's obtaining the requested paraprofessional services in a religious

school, an award against the State is "unnecessary to vindicate [appellants'] federal rights." *Rose*, 748 F.2d at 1264.[7]

CONCLUSION

In sum, we hold that appellants are not prevailing parties and thus the district court did not abuse its discretion in denying an award of attorney's fees. In the alternative, even if appellants were prevailing parties, we would hold that special circumstances justified a denial of fees.

Accordingly, we affirm the district court's order denying attorney's fees.

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[7]Although we did not decide whether nonenforcement of the rule was the kind of "direct relief" *Farrar* requires, *see supra* at 12, we believe the resolution of the Westendorps' claims supports the State's arguments that it was not.

18 F.Supp.2d 1002
(Cite as: 18 F.Supp.2d 1002)

Joan **PETER**, Sarah Peter, a minor, By and Through her parent and natural guardian Joan Peter, Krista Westendorp, Douglas Westendorp and Aaron Westendorp, a minor, by and through his parents and natural guardians Krista Westendorp and Douglas Westendorp, Plaintiffs,

v.

Robert **WEDL**, Commissioner, Minnesota Department of Children, Families and Learning, Arne H. Carlson, Governor, State of Minnesota, Independent School District No. 877 (Buffalo, Minnesota) and Independent School District No. 273 (Edina, Minnesota), Defendants.

No. CIV. 4-96-642 (DSD/JMM).
United States District Court,
D. Minnesota.
Aug. 12, 1998.

Disabled parochial school students, and their parents in their own right and as next friends, filed application for award of attorney fees following entry of consent judgment in §1983 litigation against school districts and state agencies, 958 F.Supp. 1383. The District Court, Mason, United States Magistrate Judge, held that: (1) consent judgment against state agencies did not result in material alteration of relationships between students and agencies, or between students

and school districts; (2) agencies enforcing challenged statute acted in accordance with their constitutional duties by following prior holdings of United States Supreme Court until that Court announced change in controlling precedent; (3) instant litigation was not catalyst for remedial action taken by state agencies; and (4) special circumstances warranted exercise of District Court' discretion to deny fee application.

Application denied.

[1] CIVIL RIGHTS k305
78k305

District Court had jurisdiction over plaintiffs' joint motion for attorney fees in action under §1983, notwithstanding pendency of one plaintiff's appeal from dismissal of his complaint, where substantial submissions by parties on fee issues were sufficient and complete. 42 U.S.C.A. §§1983, 1988.

[2] CIVIL RIGHTS k296
78k296

In determining whether plaintiff in action under §1983 is entitled to award of attorney fees pursuant to §1988, court must first determine whether plaintiff is "prevailing party," and, if it so determines, go on to determines amount of reasonable and appropriate attorney fee. 42 U.S.C.A. §§1983, 1988.

[3] CIVIL RIGHTS k296
78k296
Mere fact of settlement does not prevent party from being "prevailing party" for purpose of motion for attorney fees in action under §1983. 42 U.S.C.A. §§1983, 1988. See publication Words and Phrases for other judicial constructions and definitions.

[4] CIVIL RIGHTS k296
78k296
Consent judgment against state agencies, defendants in action by disabled students under §1983, did not result in material alteration of relationship between particular plaintiff and agencies, or between plaintiff and school district also named as defendant, as required for finding that that plaintiff was "prevailing party" as against agencies for purposes of award of attorney fees, where relief that plaintiff obtained from agencies did not directly benefit him at time of judgment or settlement. 42 U.S.C.A. §§1983, 1988. See publication Words and Phrases for other judicial constructions and definitions.

[5] CIVIL RIGHTS k296
78k296
Consent judgment against state agencies, defendants in action by disabled students under §1983, insofar as it enjoined enforcement of state statute prohibiting provision of special education services to disabled students on premises of private religious schools, did

not result in material alteration of relationship between one student plaintiff and school district also named as defendant, as required for finding that that student was "prevailing party" as against school district for purposes of award of attorney fees, where district's refusal to provide services was based on its own policy unaffected by consent judgment. 42 U.S.C.A. §§1983, 1988; Minn.R. 3525.1150. See publication Words and Phrases for other judicial constructions and definitions.

[6] CIVIL RIGHTS k296
78k296

Disabled student, plaintiff in action against state agencies and school district under §1983, was not "prevailing party" as against state agencies for purposes of award of attorney fees, where scope of consent judgment against agencies was limited to injunction against enforcement of state statute prohibiting provision of special education services to disabled students on premises of private religious schools, and student obtained services through settlement with district rather than from agencies. 42 U.S.C.A. §§1983, 1988; Minn.R. 3525.1150. See publication Words and Phrases for other judicial constructions and definitions.

[7] CIVIL RIGHTS k292.1
78k292.1

For purpose of determining scope of §1983 plaintiffs' entitlement to award of attorney fees, state agencies

against whom consent judgment was entered enjoining enforcement of state statute acted in accordance with their constitutional duties by following prior holdings of United States Supreme Court until that Court announced change in controlling precedent. 42 U.S.C.A. §§1983, 1988; Minn.R. 3525.1150.

[8] CIVIL RIGHTS k296
78k296
"Catalyst theory" of denominating prevailing parties in actions under §1983 for purposes of attorney fee awards addresses situations in which remedial action is taken prior to conclusion of suit, providing that even if remedial action would render lawsuit moot, plaintiff will be entitled to prevailing party status if lawsuit was a catalyst that brought about or prompted defendant's remedial action. 42 U.S.C.A. §§1983, 1988. See publication Words and Phrases for other judicial constructions and definitions.

[9] CIVIL RIGHTS k296
78k296
Litigation brought against school districts and state agencies by disabled students under §1983 was not "catalyst" for remedial action taken by state agencies, and students therefore were not prevailing parties entitled to award of attorney fees under catalyst theory of designation of prevailing parties, where chronology of case supported conclusion that policy change set forth in consent judgment was taken as result of

decision of United States Supreme Court rather than as result of students' action. 42 U.S.C.A. §§1983, 1988. See publication Words and Phrases for other judicial constructions and definitions.

[10] CIVIL RIGHTS k296
78k296
In deciding, for purposes of award of attorney fees in action under §1983, whether litigation was significant catalyst in prompting remedial action, district court conducts intensely factual inquiry, resolving question of cause or catalyst by taking into consideration chronology of events. 42 U.S.C.A. §§1983, 1988.

[11] CIVIL RIGHTS k296
78k296
Even if disabled students, plaintiffs in action against school districts and state agencies under §1983, were prevailing parties in that action, special circumstances warranted denial of attorney fees as matter of District Court's discretion; challenged state statute was in accordance with established United States Supreme Court precedent, Supreme Court clarified precedent in decision pending at time instant action was brought, and agencies ceased enforcement of statute in accordance with that clarification. 42 U.S.C.A. §§1983, 1988; Minn.R. 3525.1150.

[12] CIVIL RIGHTS k296
78k296
Although §1988 refers to "discretion" of District Court to award attorney fees to prevailing party in action under §1983, fees should normally be awarded once it is determined that party is "prevailing party." 42 U.S.C.A. §§1983, 1988.

[13] CIVIL RIGHTS k297
78k297
"Good faith" of defendants may not be used to deny award of attorney fees to which plaintiffs are otherwise entitled under §1983. 42 U.S.C.A. §§1983, 1988.

*1004 J. Matthew Szymanski, Gammon & Grange, McLean, VA, for Plaintiffs.

Steven Liss, Rachel Kaplan, Minnesota Atty. Gen. Office, St. Paul, MN, for Defendants.

ORDER

MASON, United States Magistrate Judge.

The above matter came on for hearing upon Plaintiffs' Application for an Award of Attorneys' Fees and Expenses Against the State Defendants[1] [Docket

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[1]Defendants Robert Wedl, the Commissioner of the Minnesota Department of Children, Families and Learning, and Arne H. Carlson, the Governor of Minnesota, are referred to by Plaintiffs' counsel as the "State Defendants." This Court will also use that terminology herein when referring to them.

No. 123], pursuant to the provisions of 42 U.S.C. §1988. The Motion is before the undersigned for an Order, pursuant to 28 U.S.C. §636(c) and related Rules of this Court. The parties waived their right to proceed before a United States District Judge and voluntarily consented to have proceedings on said Motion conducted and determined by the undersigned U.S. Magistrate Judge, including an Order for the entry of judgment thereon. It was so ordered by District Judge David S. Doty. [Docket No. 146].

Plaintiffs seek an award of $272,494.80 for legal services "(a) *on the merits* from preparation of plaintiffs' pre-litigation demand letter until the July 31, 1997 Stipulation by the State Defendants granting plaintiffs full relief and mooting their claims against the State, and (b) for the *fee recovery* effort commencing July 1, 1997 and continuing to the present." Docket No. 123 (emphasis in ***1005** original). J. Matthew Szymanski, Esq., appeared on behalf of Plaintiffs; Steven B. Liss, Esq. and Rachel L. Kaplan, Esq. appeared on behalf of the State Defendants.

FINDINGS OF FACT

The Parties

Plaintiffs Sarah Peter and Aaron Westendorp are disabled children. Sarah Peter is a child with Down's Syndrome. She resides with her mother, Joan Peter, in Buffalo, Minnesota, within the geographical

boundaries of Independent School District No. 877. Aaron Westendorp is a child with disabilities resulting from a brain stem lesion. He has facial paralysis and spastic quadri paresis, breathes through a permanent tracheostomy, eats through a permanent gastrostomy tube, and is unable to speak. He has full cognitive functions, however, and is able to communicate through use of finger spelling. Complaint at ¶32. He resides with his parents Douglas Westendorp and Krista Westendorp in Edina, Minnesota, within the geographical boundaries of Independent School District No. 273.

Plaintiff Choice in Education Foundation, Inc., is a nonprofit advocacy corporation whose members include parents of children with special education needs, and religious schools and organizations.

Allegations in the Complaint

The Complaint was filed on July 26, 1996. It alleges violations of 42 U.S.C. §1983 for deprivation of Plaintiffs' rights under the free speech clause and the free exercise clause of the First Amendment to the United States Constitution, and under the equal protection clause of the Fourteenth Amendment to the United States Constitution. The Complaint also sought relief for the alleged violation of the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §2000bb, *et seq.*, and the Individuals with Disabilities Education Act, 20 U.S.C. §1400 ("IDEA"), *et seq.*

Most of the underlying facts pertinent to this dispute are set forth in the District Court's Order of March 26, 1997, *Peter v. Johnson*, 958 F.Supp. 1383 (D.Minn. 1997).

The principal allegation of Plaintiffs' Complaint against the School Districts is that Sarah Peter and Aaron Westendorp should have been provided on-site paraprofessional services at private religious schools. The allegation against the State Defendants is that their Rule on that subject (Minn. Rule 3525.1150, subparts 1 and 2) was unconstitutional, when read in connection with the provisions of Minn.Stat. §123.932, subds. 3 and 9. The Complaint asked for a declaration of the invalidity of the Rule, and an injunction requiring the School Districts to refrain "from denying special education services of any kind, including on-premises services, on the basis of the religious nature of the private school chosen by the parents of an otherwise eligible child." The Complaint also sought costs and attorneys' fees pursuant to 42 U.S.C. §1988.

Plaintiffs' Complaint specifically challenged Minnesota's regulations and policies which implement the State's policies and plan under the IDEA. The IDEA states that children with disabilities are to be provided with a "free appropriate public education." 20 U.S.C. §1400(c). The IDEA is implemented in Minnesota under the state statute and regulations. Minn.Stat. §120.17; Minn. Rules ch. 3525.

Minnesota Rule 3525.1150, subp. 1, provides in part: "Districts shall identify and make available special education to all students who are disabled regardless of whether they attend a nonpublic school...."

Minnesota Rule 3525.1150, subp. 2 provides: "Special education services provided indirectly or directly or the pupil must be provided at a neutral site that is consistent with Minnesota Statutes, section 123.932, subdivision 9." That Statute defines "neutral site" as "a public center, a nonsectarian nonpublic school, a mobile unit located off the nonpublic school premises, or any other location off the nonpublic school premises which is neither physically nor educationally identified with the functions of the nonpublic school."

Under Minn.Stat. §123.932, subd. 3, "nonpublic school" means "any school, church or religious organization, or home school" wherein a Minnesota resident may legally fulfill the compulsory instruction requirements. ***1006** "It does not mean a public school." *Id.*

Under Minn.Stat. §123.932, subd. 3a, a "nonsectarian nonpublic school" means "any nonpublic school as defined in subdivision 3, which is not church related, is not controlled by a church, and does not promote a religious belief." A nonpublic sectarian

school is not included in the definition of a "neutral site." *Peter v. Johnson*, 958 F.Supp. 1383 at 1388 (D.Minn. 1997).

Plaintiffs' Complaint alleged that "[t]he effect of Minnesota State Rule 3525.1150, in connection with the referenced Minnesota Statutes, is to deny on-premises special education services to otherwise eligible students attending private religious schools, but to authorize such services for eligible students attending private non-religious schools, where such services are deemed an appropriate part of a child's IEP." Complaint at ¶16.[2]

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[2]Under the IDEA, an "individual education plan" or "IEP" must be developed before special education services can be provided. An "IEP" is "a written individualized educational plan" for a pupil "based on an assessment of the pupil's performance, presenting problems and its effect on learning in appropriate settings." Minn. Rule 3525.0200, subp. 6a. An IEP "sets out the child's present educational performance, establishes annual and short-term objectives for improvements in that performance, and describes the specially designed instruction and services that will enable the child to meet those objectives." *Honig v. Doe*, 484 U.S. 305, 311, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988).

Early Motions

Plaintiffs, the School District Defendants and the State Defendants brought early Motions for dispositive relief. Plaintiffs filed a Motion for Preliminary Injunction pursuant to Rule 65(a) of the Federal Rules of Civil Procedure [Docket Nos. 3, 5 & 20]. Plaintiff sought an order: "enjoining, restraining, and forbidding defendants from denying state special education services, including on-premises services, to otherwise eligible handicapped children on the basis of the fact that a child attends, or through his parents seeks to attend, a nonpublic school that is religious in nature or point of view, or includes religion in the content of its educational program, during the pendency of this litigation; and from enforcing any state rule, regulation, or policy to the contrary ....; and that Plaintiffs be awarded their reasonable costs and attorneys' fees incurred herein, pursuant to 42 U.S.C. §1988, as supported by fee application to be filed subsequently." [Docket Nos. 3 & 20].

Plaintiffs also filed a Motion for Partial Summary Judgment, seeking "an Order granting summary judgment in Plaintiffs' favor on Count V of the Plaintiffs' Complaint" [Docket No. 67]. (Count V of the Complaint contained Plaintiff's IDEA claim. Docket No. 1, at ¶55.) In Plaintiffs' Memorandum of Law in Support of their Motion for Partial Summary Judgment, Plaintiffs argued that this case was controlled by *Zobrest v. Catalina Foothills School*

District, 509 U.S. 1, 113 S.Ct. 2462, 125 L.Ed.2d 1 (1993). Plaintiffs argued that any reliance on earlier cases like *Meek v. Pittenger*, 421 U.S. 349, 95 S.Ct. 1753, 44 L.Ed.2d 217 (1975), *Aguilar v. Felton*, 473 U.S. 402, 105 S.Ct. 3232, 87 L.Ed.2d 290 (1985), and *Grand Rapids v. Ball*, 473 U.S. 373, 105 S.Ct. 3248, 87 L.Ed.2d 267 (1985), was misplaced. Docket No. 68, at 24-26.

The State Defendants moved to Dismiss Plaintiffs' claims on various grounds [Docket No. 13]. The School Districts also filed Motions to Dismiss Plaintiff's Complaint pursuant to Rule 12 of the Federal Rules of Civil Procedure [Docket Nos. 14 & 15].

Decision on Early Motions

The District Court issued its decision on those Motions on March 26, 1997 [Docket No. 79]. *Peter v. Johnson*, 958 F.Supp. 1383 (D.Minn. 1997). The Court denied Plaintiffs' Motion for Preliminary Injunction and Plaintiffs' Motion for Partial Summary Judgment. Defendants' Motion to Dismiss the IDEA Count (Count V), was granted. In addition, the Court dismissed Plaintiff Choice in Education Foundation, Inc. as a Plaintiff. The other Motions were denied.

In its Opinion, the District Court found that the Peters and the Westendorps had standing to bring their claims, even though *1007 Sarah Peter and Aaron

Westendorp were not currently enrolled in private schools. *Peter*, 958 F.Supp. at 1391. The Court then construed Plaintiffs' Section 1983 claims to be alleged against the State Defendants in their official capacities, and dismissed Plaintiffs' claims to the extent that they were asserted against the State Defendants in their individual capacities. The District Court ruled that because Plaintiffs sought injunctive relief against the State Defendants in their official capacities for alleged violations of federal law, "the §1983 claims against the state defendants are not barred by the Eleventh Amendment." *Id.* at 1394 & n. 1.

After noting that "[a]n underlying constitutional right must exist before a cause of action under section 1983 will lie," the District Court then proceeded to analyze Plaintiffs' allegations that Defendants violated the Freedom of Speech and Free Exercise of Religion Clauses of the First Amendment, and the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 1394- 95. The District Court concluded that the allegations were sufficient to avoid dismissal, but it denied Plaintiffs' Motions for Summary Judgment or a Preliminary Injunction

As to rights under the RFRA, the District Court ruled: "The parties agree that the pending motions may be resolved without addressing the RFRA claim; thus, the court does not address the RFRA claim or

constitutional challenge [to the RFRA] at this time." *Peter*, 958 F.Supp. at 1395.[3]

With respect to Plaintiffs' IDEA claim, the District Court stated:

> "Whereas the plaintiffs argue that the plain language of Minnesota Rule 3525.1150 and the school districts' denial of services to Sarah Peter and Aaron Westendorp violates the U.S. Constitution by allegedly discriminating in the provision of special education services on the basis of the religious content and viewpoint of a private school's instructional programs, the plaintiffs accept defendants' factual statements for purposes of their motion for partial summary judgment on the IDEA claim. Thus, for the purposes of this motion, the plaintiffs accept that the school districts deny on-site services to all children attending private schools, religious or nonreligious. Plaintiffs

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[3]Had the State Defendants acquiesced in applying the RFRA as urged by Plaintiffs, it would have been inconsistent with the later decision of the Supreme Court determining that the RFRA was unconstitutional. *City of Boerne v. P.F. Flores*, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997).

> maintain that the IDEA and its regulations mandate that on-site special education services be provided at nonpublic schools to students whose special education needs are such that they require individualized paraprofessional services in their regular classrooms."

Id. at 1396. The District Court then held:

> "[T]he statute and its regulations do not require the State defendants or local school districts to provide on-site paraprofessional services to the plaintiffs at private schools as a component of their individualized education program. Because the court decides that there is no individual entitlement to services under the IDEA and its regulations for unilaterally-placed private school children with disabilities who require individualized services, the court need not address whether the Establishment Clause provides a justification for the denial of publicly funded on-site assistance. The court concludes that the defendants are entitled to partial summary judgment on the IDEA count."

Id. at 1399-1400.

With respect to Plaintiffs' Motion for Preliminary Injunction, the District Court ruled: "Because the court has determined that the IDEA and its regulations do not require that the State and local school districts provide such services, the court considers plaintiffs' motion only as to its remaining constitutional and RFRA claims." *Id.* at 1400. After balancing the four factors set forth in *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981), the District Court ruled:

> "In balancing the Dataphase factors, the court has considered the broad discretion that the state and local school districts have in providing educational services and defining educational policy.... The court ***1008** concludes that even if the plaintiffs were to prevail on their constitutional and federal claims, it would be inclined to enjoin enforcement of the regulations and policies to reflect the policies to which the defendants urge they currently adhere: that defendants do not provide on-site paraprofessional services to any student voluntarily attending private school, regardless of the school's religious or nonreligious

> nature. Thus, plaintiffs' motion for preliminary injunction is denied."

Id. at 1401(emphasis supplied).

Supreme Court Agostini Decision

On June 23, 1997, the Supreme Court issued its opinion in ***Agostini v. Felton***, 521 U.S. 203, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997). (The Supreme Court had granted a Writ of Certiorari on January 17, 1997). In the *Agostini* opinion, the Supreme Court expressly overruled its decision in ***Aguilar v. Felton***, and effectively overruled the other authority which the State Defendants had felt compelled their Rules. The State Defendants promptly advised Plaintiffs that they would acquiesce in the *Agostini* decision.

On June 26, 1997, Plaintiffs Aaron Westendorp, Krista Westendorp and Douglas Westendorp brought a new Motion for Preliminary Injunction, relying on the Agostini decision [Docket No. 89]. That Motion sought an order pursuant to Rule 65(a) of the Federal Rules of Civil Procedure as follows:

> "Ordering defendants to provide special education services to plaintiff Aaron Westendorp, in accordance with his needs, on the premises of Calvin Christian School, a private religious

> school, during the pendency of this litigation; and from enforcing Minnesota Rule 3525.1150 or any other state or local rule, regulation, policy, practice, or custom, that operates to prohibit provision of on-site special education services to children with disabilities attending private religious schools, until further notice by Order of this Court; ... and that Plaintiffs be awarded their reasonable costs and attorneys' fees incurred herein, pursuant to 42 U.S.C. §1988, as supported by fee application to be filed subsequently."

The State Defendants immediately advised Plaintiffs in writing that "[i]n light of the recently decided *Agostini v. Felton* case, the Commissioner intends to no longer enforce Minn. R. 3525.1150 to prevent school districts from providing special education services on-site at sectarian schools and will take action to repeal the Rule to the extent it is inconsistent with Agostini." Docket No. 95, at 1-2; Docket No. 96, Ex. A. The State Defendants also agreed "to work in good faith with the Minnesota Board of Education to achieve the amendment of Rule 3525.1150, subpart 2, by striking the following sentence: 'special education services provided indirectly or directly to the pupil must be provided at a

neutral site that is consistent with Minnesota Statutes, section 123.932, subdivision 9.'" Docket No. 97 at ¶3.

State Defendants Settlement With Plaintiffs

On July 31, 1997, the remaining Plaintiffs and the State Defendants stipulated to the entry of a Preliminary Injunction enjoining the Commissioner of Children, Families and Learning from enforcing Rule 3525.1150 to prohibit School District Defendants from providing Plaintiffs on-site special education and related services at religious schools [Docket No. 97]. On August 5, 1997, the District Court granted a preliminary injunction as follows: "The State Defendants are hereby enjoined and restrained from enforcing Rule 3525.1150 insofar as it prohibits provision of special education services to Plaintiffs Sarah Peter and Aaron Westendorp on the premises of a private religious school." [Docket No. 98].

The State Defendants contend that this Settlement renders the lawsuit moot as to them, and that since the issues between Plaintiffs and the School Districts have been resolved, they believe that the entire matter should be dismissed. Plaintiffs disagree. Paulsen Affidavit, paragraph 39b.

Peter Settlement With School District.

Plaintiffs Joan Peter and Sarah Peter and Buffalo School District No. 877 also reached a Settlement Agreement. Under the terms of their

agreement, the School District *1009 agreed to pay $31,500 to the Peters for damages including attorneys' fees. It also agreed to rescind policies which would prevent provision of in-classroom services at private schools in that District, and to provide Sarah Peter such services at her private school. The Peters agreed to dismiss their Complaint against the School District with prejudice. Judgment was entered on their Stipulation, dismissing their claims against the School District with prejudice [Docket Nos. 112, 113].

Westendorp Claims Dismissed

The Westendorps' new Motion for Preliminary Injunction against Edina School District No. 273 remained for decision. [Docket No. 93]. On August 12, 1997, the District Court issued an Order denying the Westendorps' Motion for Preliminary Injunction. Docket No. 101. The District framed the issue before it as follows:

> "The issue now presented to this court is whether plaintiff Westendorp has made the requisite showing for this court to issue a preliminary injunction *requiring* defendant Independent School District No. 273 (Edina, Minnesota), to provide on-site, individualized, paraprofessional services to Westendorp at Calvin Christian School, which is the religious school of Westendorp's choice."

Docket No. 101, at 4-5 (emphasis in original). The District Court then ruled:

> "The court's decision with respect to the injunction issue has not changed from this court's earlier decision for the reasons already stated in *Peter v. Johnson*, 958 F.Supp. 1383 (D.Minn. 1997).... The remaining claims before the court are plaintiff's section 1983 claims alleging constitutional violations based on the school district's alleged differential treatment between children who attend nonpublic nonreligious schools and children who attend nonpublic religious schools. There has been no showing on the part of plaintiff that he is substantially likely to prevail on these constitutional claims since there is no evidence in the record that Independent School District No. 273 treated children differently on the basis of whether they attended nonpublic nonreligious schools or nonpublic religious schools, notwithstanding the language of Rule 3525.1150. Throughout this litigation, Independent School District No. 273's position has been that it treats all nonpublic school children the same and does not make

> distinctions in the provision of services based upon the religious nature of the school."

Id. at 6-7. In a subsequent footnote, the District Court stated:

> "Prior to the Supreme Court's decision in *Agostini*, the school district provided on-site services to preschool children who attended nonpublic nonreligious schools but did not provide such services to preschool children who attended nonpublic religious schools. Since the Supreme Court's decision, the school district will provide such services to preschool children who attend nonpublic religious schools."

Id. at 7 n. 2. The District Court ruled that "Plaintiff has not demonstrated a likelihood of success on the merits as to his constitutional challenges which were pleaded in the complaint." *Id.* at 8.

On August 20, 1997, the Plaintiffs moved the District Court "for leave to file and serve a Supplemental Complaint." Docket No. 102. That motion, brought pursuant to Rule 15 of the Federal Rules of Civil Procedure, sought to add a state law claim, asserting that the conduct of District No. 273

and District No. 877 violates Minn.Stat. §120.17, Minn.Stat. §123.931, and Minnesota Rule 3525.1150. Docket No. 104, Ex. G. On August 28, 1997, the Westendorps moved the District Court "for clarification of the Court's Order dated August 12, 1997, denying Plaintiffs' motion for preliminary injunction." Docket Nos. 107 & 108.

The District Court granted summary judgment against the Westendorps, in favor of the School District. It denied the Westendorps' new Motion for Preliminary Injunction against the School District [Docket No. 109]. By Order dated September 2, 1997, which attached a Stipulation signed by counsel for the Westendorps and District No. 273, the District Court granted the Westendorps' motion to file a supplemental pleading and the ***1010** motion for clarification of the Court's Order of August 12, 1997. In the same Order of September 2, 1997, the District Court then rejected the supplemental claim and held "[t]hat the Court's Order of August 12, 1997 denying plaintiffs' motion for preliminary injunction, shall, as amended by this Order, constitute the final summary judgment of the Court resolving all of plaintiffs' claims against defendant [District No. 273] on the merits." The District Court ruled: "Pursuant to Fed.R.Civ.P. 56, and based on all the pleadings, files, records, proceedings and arguments in the case, the Court therefore grants summary judgment to defendant [District No. 273] against plaintiffs AARON

WESTENDORP, KRISTA WESTENDORP, and DOUGLAS WESTENDORP on all counts, including the supplemental state law claim." Docket No. 109. Judgment was entered on the District Court's Order on September 2, 1997. Docket No. 110. The Westendorps have appealed that judgment to the Court of Appeals for the Eighth Circuit.

Motion for Attorneys' Fees

[1] This Court has jurisdiction over the collateral issue of the Motion for Attorneys' fees, notwithstanding the appeal by the Westendorps from the judgment dismissing their Complaint against the School District. *Little Rock v. Arkansas*, 127 F.3d 693 (8th Cir. 1997); *See also Obin v. District No. 9 of Int'l Assn. Of Machinists*, 651 F.2d 574, 583 (8th Cir. 1981); Local Rule 54.3.

Plaintiffs' Application for an Award of Attorneys' Fees and Expenses Against the State Defendants was filed on January 12, 1998 [Docket No. 123]. (The parties had jointly requested in a stipulation that the District Court give them time to attempt to reach an agreement on attorneys' fees, and agreed that if they failed "a briefing schedule would be set concerning the attorneys' fees issue if this issue is not resolved at that time." Docket No. 97 at ¶8.) In a footnote to their initial Memorandum, Plaintiffs stated: "In the event, however, the Court is not persuaded by our arguments on fee entitlement based solely on the

record provided, we continue to request a limited ability to conduct discovery on the effect of this litigation on the state Defendants to further prove the catalyst theory." Plaintiffs' initial Memorandum, fn. 15, p. 16 of 39. Leave of Court was not required to permit Plaintiffs to have taken discovery prior to presenting their Motion for Attorneys' fees.[4]

We are satisfied that the substantial submissions by the parties were sufficient and complete. "A request for attorney's fees should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). *See also Associated Builders v. Orleans Parish*, 919 F.2d 374 at 377-378 (5th Cir. 1990). Plaintiffs were permitted to submit Memoranda in support of their Motion which exceeded page limitations. In addition, their Memoranda contained lengthy single space footnotes, and incorporated by reference many other materials, including more than 75 pages of single spaced correspondence containing legal argument. Plaintiffs' supporting materials included three three-ring binders filled with Affidavits and Exhibits, supplemented by additional Affidavits filed with their Reply. A summary of the contents of the three-ring binders is in the form of a nine-page "Annotated Exhibit List to Fee Application." This Court denied Defendants' Motion

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[4]Even if permission for discovery were required, it could not be sought by a footnote in a Memorandum, nor conditionally as stated.

to strike Plaintiffs' filings, and fully considered all of the materials submitted.

DISCUSSION

[2] Under federal law, a "prevailing party" is permitted to recover reasonable attorneys' fees in any action brought pursuant to 42 U.S.C. §1983. The statute reads as follows:

> "In any action or proceeding to enforce a provision of section [ ] ... 1983 ... of this title, ... [or] the Religious Freedom Restoration Act of 1993 ... the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs ...."

***1011** 42 U.S.C. §1988(b). Analytically, the task of the Court is to first determine whether the Plaintiff is a "prevailing party," an issue as to which *Farrar v. Hobby*, 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992) is particularly instructive. If so, the Court then determines the amount of a reasonable attorneys' fee that would be appropriate, taking into consideration factors identified in *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). There are also many instructive opinions of the Court of Appeals for the Eighth Circuit on both subjects.

The attorneys seeking recovery in this matter provided legal services on behalf of all of the Plaintiffs, against all of the Defendants. The Motion for attorneys' fees, however, is brought only by the remaining Plaintiffs,[5] and it seeks recovery of attorneys' fees only against the State Defendants. Analysis is facilitated by considering each of the Plaintiffs *vis-a-vis* each of Defendants.

Plaintiff Choice in Education Foundation, Inc. was dismissed with prejudice by the Order of the District Court of March 26, 1997. *Peter v. Johnson*, 958 F.Supp. 1383 (D.Minn. 1997). No contention is made that this Plaintiff is a prevailing party against any Defendant, and it does not seek fees in this matter.

The Westendorps did not prevail in their claim against their School District. Summary Judgment was entered against them, from which they have appealed. No claim is made that they are prevailing parties against their School District.

[3] The Peters reached a Settlement Agreement with the School District, and dismissed their claim against them with prejudice. The mere fact of settlement does not prevent a party from being a prevailing party. However, the Peters have received

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[5]As noted earlier, Choice in Education Foundation, Inc. had been dismissed as a Plaintiff by the District Court as part of its March 27, 1998 Order.

from the School District an amount to compensate them for all attorneys' fees incurred in their dispute with the School District, and do not seek additional fees from it.

[4] The Motion contends that the Westendorps are prevailing parties against the State Defendants. We cannot conclude that the consent Judgment against the State Defendants resulted in a material alteration of the relationship between the Westendorps and the State Defendants or the School District. The relief that the Westendorps obtained from the State did not directly benefit them at the time of the judgment or settlement. For the reasons stated in *Farrar v. Hobby*, 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992), the Westendorps are not prevailing parties. In *Farrar*, the Supreme Court held:

> "Therefore, to qualify as a prevailing party, a civil rights Plaintiff must obtain at least some relief on the merits of his claim. The Plaintiff must obtain an enforceable judgment against the Defendant from whom fees are sought, or comparable relief through a consent decree or settlement. Whatever relief the Plaintiff secures must directly benefit him at the time of the judgment or settlement. Otherwise the judgment or settlement cannot be said to 'affec[t] the

> behavior of the Defendant toward the Plaintiff.' Only under these circumstances can civil rights litigation effect 'the material alteration of the legal relationship of the parties' and thereby transform the Plaintiff into a prevailing party. In short, a Plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the Defendant's behavior in a way that directly benefits the Plaintiff."

Farrar, 506 U.S. at 111-112, 113 S.Ct. 566 (internal citations omitted). *See also Warner v. Indep. School Dist. 625*, 134 F.3d 1333 (8th Cir. 1998).

[5] The Order of the District Court, based upon the Stipulation of the parties, enjoined the State Defendants "from enforcing Rule 3525.1150 insofar as it prohibits provision of special education services to Plaintiffs Sarah Peter and Aaron Westendorp on the premises of a private religious school." As we have seen, even in the presence of this consent Injunction against the State Defendants, the School District would ***1012** not provide special education services to Aaron Westendorp at a private religious school, and the District Court did not conclude that it was required to do so.

[6] The issue of providing special education services is shown to be independent of the State Rule which was challenged. Although the Peters did obtain direct relief meeting the *Farrar* standards, they obtained that relief in their settlement with the School District, not from the State, so they were not prevailing parties *vis-a-vis* the State Defendants, under the *Farrar* standard.

[7] The State Defendants contend that the Rule challenged by the Plaintiffs, and related statutes, was initially mandated by decisions of the Supreme Court such as *Meek v. Pittenger*, 421 U.S. 349, 95 S.Ct. 1753, 44 L.Ed.2d 217 (1975), *Aguilar v. Felton*, 473 U.S. 402, 105 S.Ct. 3232, 87 L.Ed.2d 290 (1985), and *Grand Rapids v. Ball*, 473 U.S. 373, 105 S.Ct. 3248, 87 L.Ed.2d 267 (1985). They contend that *until* the Supreme Court announced the new law in the *Agostini* decision, they were bound to follow the law as it had been decided prior to that decision.

Plaintiffs argue that the holdings in those cases were effectively reversed by the decision of the Supreme Court in *Zobrest v. Catalina Foothills School District*, 509 U.S. 1, 113 S.Ct. 2462, 125 L.Ed.2d 1 (1993), and that therefore the Defendants were under a duty to alter the Rule which is challenged in this litigation, in anticipation of what the Supreme Court would rule in *Agostini*.

Agostini Analysis

We set forth below the historical background of the *Agostini* decision. That analysis shows that Plaintiffs were correct that *Zobrest* had set the stage for change in the underlying law. But the opinion of the Supreme Court in *Agostini* also substantiates the claim of the State Defendants that they acted in accordance with their constitutional duties by following the prior holdings of the Supreme Court until it announced the change. Attorneys' fees are therefor not warranted for this additional reason.

In *Aguilar v. Felton*, 473 U.S. 402, 105 S.Ct. 3232, 87 L.Ed.2d 290 (1985), the United States Supreme Court addressed the question of whether the Establishment Clause of the First Amendment barred the City of New York's practice of using federal funds to pay the salaries of public employees who teach in parochial schools. *Id.* at 404, 105 S.Ct. 3232. In that case, six taxpayers sued to enjoin the further distribution of funds to programs involving educational instruction on the premises of parochial schools, alleging that a federal program administered by the City of New York violated the Establishment Clause. *Id.* at 407, 105 S.Ct. 3232. The City of New York had provided instructional services to parochial school students on the premises of parochial schools since 1966. *Id.* at 406, 105 S.Ct. 3232. The program at issue in Aguilar authorized the Secretary of Education to distribute financial assistance to local educational

institutions to meet the needs of educationally deprived children from low income families. *Id.* at 404, 105 S.Ct. 3232. Under those facts, the *Aguilar* Court held that the Establishment Clause barred the City of New York from sending public school teachers into parochial schools to provide remedial education to disadvantaged students. On remand, the District Court for the Eastern District of New York entered a permanent injunction enjoining the Board of Education of the City of New York "from using public funds for any plan or program ... to the extent that it requires, authorizes or permits public school teachers and guidance counselors to provide teaching and counseling services on the premises of sectarian schools with New York City." *Agostini v. Felton*, 521 U.S. 203, ___, 117 S.Ct. 1997, 2005, 138 L.Ed.2d 391 (1997).

In the companion case of *School District of Grand Rapids v. Ball*, 473 U.S. 373, 105 S.Ct. 3248 (1985), the Supreme Court held unconstitutional under the Establishment Clause two remedial and enhancement programs operated by the Grand Rapids Public School District, in which classes were provided to private school children at public expense in classrooms located in and leased from the local private schools. In a case decided ten years earlier, the Supreme Court also invalidated a state program that offered, *inter alia*, guidance, testing, and remedial and therapeutic services performed by public employees ***1013** on the premises of parochial schools. *Meek v.*

Pittenger, 421 U.S. 349, 352-53, 95 S.Ct. 1753, 44 L.Ed.2d 217 (1975).

In *Agostini v. Felton*, 521 U.S. 203, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997), a 5-4 decision handed down by the Supreme Court on June 23, 1997, the petitioners--the very parties bound by the injunction in *Aguilar v. Felton*, 473 U.S. 402, 105 S.Ct. 3232, 87 L.Ed.2d 290 (1985)--sought relief from its operation. *Agostini*, 521 U.S. at ___, 117 S.Ct. at 2003. The petitioners in Agostini asserted that "*Aguilar* cannot be squared" with the Supreme Court's "intervening Establishment Clause jurisprudence" and asked the Court to "explicitly recognize what [its] more recent cases already dictate: Aguilar is no longer good law." *Id.* In that procedural context, the majority of the Justices in *Agostini* concluded: "We agree with petitioners that Aguilar is not consistent with our subsequent Establishment Clause decisions and further conclude that, on the facts presented here, petitioners are entitled under Federal Rule of Civil Procedure 60(b)(5) to relief from the operation of the District Court's prospective injunction." *Agostini*, 521 U.S. at ___, 117 S.Ct. at 2003.

The facts giving rise to the Agostini decision are fairly straightforward. In October and December of 1995, the petitioners--the Board of Education and a new group of parents and parochial school students entitled to Title I services--filed motions in the District

Court seeking relief from the permanent injunction entered by the District Court on remand from the Supreme Court's decision in *Aguilar. Agostini*, 521 U.S. at ___, 117 S.Ct. at 2006. Petitioners argued that relief was proper under Rule 60(b)(5) and the Supreme Court's decision in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 112 S.Ct. 748, 116 L.Ed.2d 867 (1992), because the "decisional law [had] changed to make legal what the [injunction] was designed to prevent." *Agostini*, 521 U.S. at ___, 117 S.Ct. at 2006. In particular, the petitioners pointed to the statements of five Justices in *Board of Ed. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 114 S.Ct. 2481, 129 L.Ed.2d 546 (1994), calling for the overruling of *Aguilar. Agostini*, 521 U.S. at ___, 117 S.Ct. at 2006.

The District Court in Agostini denied the Rule 60(b) motion. The District Court recognized that petitioners, "'at bottom,' 'sought a procedurally sound vehicle to get the [propriety of the injunction] back before the Supreme Court,'" and concluded that "'the Board ha[d] properly proceeded under Rule 60(b) to seek relief from the injunction.'" *Agostini*, 521 U.S. at ___, 117 S.Ct. at 2006 (citation omitted). Despite its observations that "'the landscape of Establishment Clause decisions has changed,'" and that "'[t]here may be good reason to conclude that Aguilar's demise is imminent,'" the District Court denied the Rule 60(b) motion on the merits because Aguilar's demise had

"'not yet occurred.'" *Agostini*, 521 U.S. at ___, 117 S.Ct. at 2006 (citation omitted). The United States Court of Appeals for the Second Circuit "'affirmed substantially for the reasons stated in'" the District Court's opinion. *Agostini*, 521 U.S. at ___, 117 S.Ct. at 2006 (citati[illegible]mitted).

The United States Supreme Court granted certiorari, and reversed. The Supreme Court noted that, in *Rufo*, it held that it is appropriate to grant a Rule 60(b)(5) motion when the party seeking relief from an injunction or consent decree can show "a significant change either in factual conditions or in law." *Agostini*, 521 U.S. at ___, 117 S.Ct. at 2006 (quoting *Rufo*, 502 U.S. at 384). Noting that "petitioners' ability to satisfy the prerequisites of Rule 60(b)(5) hinges on whether our later Establishment Clause cases have so undermined *Aguilar* that it is no longer good law," *Id.* at 2007, 117 S.Ct. 1997, the *Agostini* Court held that its "more recent cases have undermined the assumptions upon which *Ball* and *Aguilar* relied." *Id.* at 2010, 117 S.Ct. 1997.

> "As we have repeatedly recognized, government inculcation of religious beliefs has the impermissible effect of advancing religion. Our cases subsequent to *Aguilar* have, however, modified in two significant respects the approach we use to assess

indoctrination. First, we have abandoned the presumption erected in *Meek* and *Ball* that the placement of public employees on *1014 parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion. In *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1, 113 S.Ct. 2462, 125 L.Ed.2d 1 (1993), we examined whether the IDEA ... was constitutional as applied to a deaf student who sought to bring his state-employed sign-language interpreter with him to his Roman Catholic high school. We held that this was permissible, expressly disavowing the notion that 'the Establishment Clause [laid] down [an] absolute bar to the placing of a public employee in a sectarian school.' .... Because the only government aid in *Zobrest* was the interpreter, who was herself no inculcating any religious messages, no government indoctrination took place and we were able to conclude that 'the provision of such assistance [was] not barred by the Establishment Clause.' ....

> Second, we have departed from the rule relied on in *Ball* that all government aid that directly aids the educational function of religious schools is invalid. In *Witters v. Washington Dept. of Servs. for Blind*, 474 U.S. 481, 106 S.Ct. 748, 88 L.Ed.2d 846 (1986), we held that the Establishment Clause did not bar a State from issuing a vocational tuition grant to a blind person who wished to use the grant to attend a Christian college ....
>
> .... We do not see any perceptible (let alone dispositive) difference between a student receiving remedial instruction in a classroom on his sectarian school's campus and one receiving instruction in a van parked just at the school's curbside. To draw this line based solely on the location of the public employee is neither 'sensible' nor 'sound,' and the Court in *Zobrest* rejected it."

Agostini, 521 U.S. at ___-___, 117 S.Ct. at 2011-12. The Supreme Court concluded: "We therefore overrule *Ball* and *Aguilar* to the extent those decisions are inconsistent with our current understanding of the

Establishment Clause." *Agostini*, 521 U.S. at ___, 117 S.Ct. at 2017.

As to the *Kiryas Joel* precedent, the Supreme Court stated: "the statements made by five Justices in *Kiryas Joel* do not, in themselves, furnish a basis for concluding that our Establishment Clause jurisprudence has changed." *Agostini*, 521 U.S. at ___, 117 S.Ct. at 2007. According to the *Agostini* Court:

> "Five Justices joined opinions [in *Kiryas Joel*] calling for reconsideration of *Aguilar*.... But the question of *Aguilar's* propriety was not before us. The views of five Justices that the case should be reconsidered or overruled cannot be said to have effected a change in Establishment Clause law."

Id.

Duty of State Defendants Prior to Reversal

The *Agostini* Court stated that "it was *Zobrest*--and not this case--that created 'fresh law,'" *Id.* at 2011, 117 S.Ct. 1997, and "after *Zobrest* we no longer presume that public employees will inculcate religion simply because they happen to be in a sectarian environment." *Id.* at 2016, 117 S.Ct. 1997. But this does not yield the conclusion that it would have been proper for the State Defendants to anticipate

the change, any more than it would have been proper for the lower courts in *Agostini* to do so. The *Agostini* Court concluded that the lower courts were correct not to overrule the *Aguilar* line of cases on their own, and had the duty to follow those precedents until overruled:

> "We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that 'if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, *the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.*' *Rodriguez de Quijas*, 490 U.S. at 484, 109 S.Ct. at 1921-1922.[6] ... *The trial court* acted ***1015** within its discretion in entertaining the motion with supporting allegations, but it *was also correct to recognize that the motion had to be denied unless and until this Court reinterpreted the binding precedent.*"

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[6]*Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989).

Agostini, 521 U.S. at ___, 117 S.Ct. at 2017 (emphasis supplied).[7] This reasoning was directly applied recently by the Fourth Circuit Court of Appeals: "Lower federal courts have repeatedly been warned about the impropriety of preemptively overturning Supreme Court precedent." *West v. Anne Arundel County, Maryland*, 137 F.3d 752, 760 (4th Cir. 1998), citing the *Agostini* opinion.

Catalyst Theory of Review

Plaintiffs state that they "have 'prevailed' completely against the State Defendants"[8] and that the "only remaining question for fee entitlement is whether Plaintiffs' lawsuit had anything to do with this excellent result." Defendants argue that Plaintiffs lawsuit did not have anything to do with the result. They argue that the State Defendants had originally adopted the challenged Rule in order to comply with Constitutional law as announced by the Supreme Court prior to the *Agostini* decision, and that immediately after that decision was rendered, they agreed not to

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[7]*See also Agostini*, 521 U.S. at ___, 117 S.Ct. at 2027 (Ginsburg, J., dissenting) ("The majority ... recognizes that *Aguilar* had not been overruled, but remained the governing Establishment Clause law, until this very day."); *id.* at 2028 (Ginsburg, J., dissenting) ("[N]othing can disguise the reality that, until today, *Aguilar* had not been overruled. Good or bad, it was in fact the law.").

[8]Although Plaintiffs disagree with entry of a final judgment against the State Defendants.

enforce the Rule, in order comply with the change in law announced by the Supreme Court.

[8] The positions of the parties may be taken as a general statement of the "catalyst theory" of denominating prevailing parties. Although some commentators have questioned the vitality of this theory after the *Farrar* decision,[9] it is regularly applied in this Circuit. The catalyst theory is meant to address situations like those presented in this case, where remedial action is taken prior to the conclusion of the suit. Even if that remedial action would render the suit moot, the plaintiff will be entitled to prevailing party status "if the lawsuit was a catalyst that brought about or prompted the defendant's remedial action." *A.J. v. Kierst*, 56 F.3d 849, 865 (8th Cir. 1995). *See also, e.g. St. Louis Fire Fighters Ass'n v. St. Louis*, 96 F.3d 323, 331 (8th Cir. 1996) ("Where a defendant voluntarily complies with a plaintiff's requested relief, thereby rendering the plaintiff's lawsuit moot, the plaintiff is a 'prevailing party' under section 1988 if his suit is a catalyst for the defendant's voluntary compliance and the defendant's compliance was not gratuitous, meaning the plaintiff's suit was neither frivolous, unreasonable nor groundless."); *Warner v. Independent School Dist. No. 625*, 134 F.3d 1333, 1337 (8th Cir. 1998) ("a fee award may be appropriate

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[9]*See The Catalyst Theory of Civil Rights Fee Shifting After Farrar v. Hobby*, 80 VA. L.REV. 1429 (1994).

under the catalyst theory if defendant provides a remedy to avoid litigating a federal claim."); *Little Rock School District v. Pulaski County*, 17 F.3d 260 (8th Cir. 1994). (In *Kierst*, recovery under the catalyst theory was denied because it was not established that the plaintiff's suit was responsible for the remedial action taken by defendants.)

[9] For the reasons already stated, we concluded that Plaintiffs are not prevailing parties using other standards. We also find that this litigation was not the catalyst for the action taken by the State Defendants, and that Plaintiffs are not prevailing parties when considered under the catalyst theory.

One of Plaintiffs' expert witnesses pointed out that "the policy of Section 1988 would be frustrated if Defendants in civil rights cases could litigate to the hilt, and upon realizing that they would not be successful, avoid an award of attorneys' fees by claiming to have been motivated by some extrinsic factor." This is among the reasons that it is necessary to review with care the claims of the parties as to whether the change in state ***1016** enforcement policy was the result of the lawsuit, as Plaintiffs claim, or the result of the Supreme Court decision in *Agostini*, as Defendants claim, and we find.

[10] "In deciding whether the litigation was a significant catalyst in prompting the [remedial] action,

the district court conducts an 'intensely factual' inquiry." *Associated Builders v. Orleans Parish*, 919 F.2d 374, 378 (5th Cir. 1990), (*quoting Posada v. Lamb County*, 716 F.2d 1066, 1072 (5th Cir. 1983)). The resolution of the question of cause, or catalyst, is aided by taking into consideration the chronology of events. *Beard v. Teska*, 31 F.3d 942, 952 (10th Cir. 1994); *Kansas Hospital Ass'n v. Whiteman*, 967 F.Supp. 452, 455 (D.Kan. 1997).

CHRONOLOGY[10]

*May, 1997	*Agostini* case pending in District Court
May 9, 1996	Plaintiffs write demand letter to State Defendants
*May 21, 1996	District Court opinion in *Agostini* case, adheres to *Aguilar*
July 26, 1996	Plaintiffs file suit
*August 30, 1996	Court of Appeals affirms District Court in *Agostini* case

[10]Matters preceded by asterisk refer to developments in the *Agostini* case.

*January 17, 1997	Supreme Court grants Certiorari in *Agostini*
March 26, 1997	District Court denies Plaintiffs' Motions for Summary Judgment and Preliminary Injunction
May 22, 1997	Deposition of Wayne Erickson
*June 23, 1997	Supreme Court decision in *Agostini*
June 24, 1997	State Defendants write to Plaintiffs re *Agostini* opinion, suggest case be put "on hold" until June 27 to assess *Agostini* implications
June 24, 1997	Plaintiffs reply in letter to State Defendants, proposing agreed upon declaratory judgment and permanent injunction against State Defendants and School District Defendants.

June 26, 1997	Plaintiffs serve Motion for Preliminary Injunction
June 26, 1997	State Defendants write to Plaintiffs: "In light of the recently decided *Agostini v. Felton* case, the Commissioner intends to no longer enforce Minn. R. 3525.1150 ... and will take action to repeal the Rule to the extent it is inconsistent with *Agostini*." State Defendants state they believe no attorneys' fees should be recovered, because "the change in policy results from the Supreme Court overruling the precedent on which the Rule was premised."
July 23, 1997	School Districts oppose Plaintiffs' Motion for Preliminary Injunction
July 31, 1997	State Defendants Stipulate with Plaintiffs for entry of

	Preliminary Injunction against State Defendants
August 5, 1997	District Court enters stipulated Order for Preliminary Injunction against State Defendants.
September 2, 1997	Summary Judgment granted against Westendorps, in favor of School District, and Judgment entered thereon
September 23, 1997	Stipulation of Dismissal With Prejudice of Peter claims against School District, and Judgment entered thereon

***1017** The chronology supports the conclusion that the action by State Defendants was taken as a result of the decision of the Supreme Court in *Agostini*, and not as a result of Plaintiffs' lawsuit. From the beginning, this case and the *Agostini* case were on parallel tracks. The decisions of the lower courts in *Agostini* were made consistent with the holdings in *Aguilar*, and so were the decisions of the State Defendants as it related to continued enforcement of

challenged Rule 3523.1150. Promptly after the Supreme Court issued its opinion in *Agostini*, reversing the lower courts in that case, the State Defendants advised Plaintiffs that they were "reversing" themselves as well. This was fully in accordance with the duty, expressly stated in *Agostini*, that it is the prerogative of the Supreme Court itself to overrule its own decisions. Until they do so, the duty is to follow the precedent "until [the Supreme] Court reinterpreted the binding precedent." *Agostini*, 521 U.S. at ___, 117 S.Ct. at 2017; *See* analysis *supra*, pp. 1014-15.

The day after the Supreme Court decision, the State Defendants wrote to Plaintiffs to say that they were reviewing the implications of the opinion, and would like a brief time to think about it. Two days later, they advised that they would no longer enforce the Rule in light of the *Agostini* decision. The close temporal relationship between the two events supports a conclusion that the decision of the Supreme Court is the reason the State Defendants decided that they could no longer enforce the challenged Rule.

The District Court had denied Plaintiffs earlier Motion for a Preliminary Injunction. After the *Agostini* decision, Plaintiffs renewed their motion. In doing so they argued that the *Agostini* decision provided the legal basis upon which to return to the District Court to request an injunction, just as the State Defendants had concluded. This serves as additional confirmation of

the impact of the *Agostini* decision on the resolution of the issues in the litigation.

Plaintiffs state that the May 22, 1997 deposition of Wayne Erickson provided new factual support for their renewed Motion for Preliminary Injunction, and that it was new factual events which caused their decision to renew the Motion. In support of that conclusion, we note that time entries relating to such a Motion began on May 28, 1997, prior to the announcement of the *Agostini* decision. But this timing could as easily be explained by the general knowledge that the Supreme Court would soon be issuing its decisions in *Agostini* and other cases.

The evidence does not persuade that it was knowledge gathered in discovery, and not *Agostini*, which provided the basis for the renewed Motion for a Preliminary Injunction. First, Plaintiffs do not show that resolution of their renewed Motion was dependent upon factual questions. Second, they make only the most general of references to the allegedly recently discovered facts. They cite only generally to the deposition of Wayne Erickson, a manager of the division of special education in the Minnesota Department of Education, without referring the Court to any specific questions or answers.

We have reviewed the deposition of Mr. Erickson, and do not find that he provided more than

confirmation that the words in the challenged Rule mean what they appear to say. He testified that under the challenged Rule, it was not up to the school district to decide whether to provide special education services, but it was up to the school district to decide where to provide those services, so long as they were not provided in a religious school.

The State Defendants did not expressly announce to Plaintiffs that they would no longer enforce the Rule until after Plaintiffs had filed their June 26, 1997 Motion for Preliminary Injunction, but this is merely because the Motion was filed before the *1018 State Defendants had a chance to tell Plaintiffs of their decision. The State Defendants had asked for three days--from June 24 to June 27--to study the *Agostini* decision. Had Plaintiffs wanted an earlier answer, it would have been available by telephone on June 26. Instead, they filed their Motion early.[11] In any event, it is not the Motion itself which was the catalyst for the decision of the State to acquiesce in a Preliminary Injunction. The State Defendants resisted the earlier Motion for Preliminary Injunction. The change in controlling law as announced in the *Agostini* decision explains the change in position.

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[11]In their letter of June 24, Plaintiffs had said that it would be necessary to file their Motion by June 27 in order to obtain relief in time for the fall. If Plaintiffs believed this was true, it does not explain why the Motion was filed on June 26.

Finally, we note the fact that the challenged Rule had been adopted in the first place to comply with earlier decisions of the Supreme Court. The conduct of the State Defendants in deciding to follow the *Agostini* decision is consistent with their earlier conduct when they adopted the Rule in order to follow earlier decisions of the Supreme Court. Put simply, the record shows that it is a desire to follow the rulings of the Supreme Court which has motivated the conduct of the State Defendants, not litigation. A fair reading of the chronology, and the related facts, substantiates this conclusion.

Prior to the decision of the Supreme Court in *Agostini*, the State Defendants acted in accordance with their duty, and followed the law as stated by the decisions of the Supreme Court in *Ball*, *Meek* and *Aguilar*. This was in accordance with their constitutional duty, just as the lower Courts did in *Agostini*. Promptly after the Supreme Court announced that it had changed the law in *Agostini*, the State Defendants declared their intention to follow the law as newly declared by the Supreme Court, again acting in a manner consistent with their constitutional duty. Since the decisions of the State Defendants were made for the purpose of complying with their duties, it may not be said that this lawsuit was a catalyst in causing such behavior.

Other Considerations

[11][12] In examining the issue as a question of whether this litigation was a catalyst for the change in state position, we conclude that it was not, and that Plaintiffs were not "prevailing" parties within the meaning of the 42 U.S.C. §1988. Even if Plaintiffs were to be viewed as "prevailing parties" under other standards, we conclude that the unique circumstances of this case present "special circumstances" which warrant the denial of attorneys' fees as a matter of discretion. It is important to note that although the statute refers to the "discretion" of the District Court to award attorneys' fees, once it is determined that a Plaintiff is a "prevailing party" attorneys' fees should normally be awarded. *E.g. Borengasser v. Arkansas State Board of Education*, 996 F.2d 196 (8th Cir. 1993). In *Jenkins v. Missouri*, 127 F.3d 709, 716 (8th Cir. 1997), the Court stated: "We have observed that a district court's discretion to deny attorneys' fees to a prevailing plaintiff is narrow. Prevailing plaintiffs should ordinarily recover fees unless special circumstances would make such an award unjust."

At the time this suit was commenced, Defendants were acting in accordance with law established by the Supreme Court in prior precedent. The Supreme Court reversed that precedent and announced a different standard, and the Defendants changed to comply with the newly adopted standard. We have found no cases which directly address the

question of attorneys' fees under this factual situation. The parties have pointed to analogous cases, which we consider below. The cases are not in agreement as to the consequences which should follow under circumstances where the law is unsettled at the time suit is commenced, is subsequently clarified, and the Defendants modify their behavior in accordance with the subsequent clarification. The results in these cases are not controlling of the result required in this case, which presents different duties of defendants.

***1019** In *Goehring v. Brophy*, 94 F.3d 1294 (9th Cir. 1996) (*cert. denied*, ___ U.S. ___, 117 S.Ct. 1335, 137 L.Ed.2d 495 (1997)), suit was commenced challenging mandatory student fees in June of 1992. In February, 1993, the California Supreme Court decided, in a different case, that the fees were unconstitutional, and on October 4, 1993, that decision became final. On November 4, 1993, the Defendants in the federal action changed their policy. On July 11, 1994, the case was dismissed as moot. On August 20, 1994, Plaintiffs sought attorneys' fees. The Court of Appeals for the Ninth Circuit affirmed the denial of attorneys' fees, concluding that Plaintiffs had failed to establish a "causal link" between the law suit and the decision of the state to alter its policy. "The changes made by the University to its student fee policy were made to comply with both the letter and the spirit of the [California Supreme Court] decision." *Id.* at 1304.

To the same effect see *Kansas Hospital Ass'n v. Whiteman*, 967 F.Supp. 452 (D.Kan. 1997).

In *Arkansas Community Org. for Reform Now v. Arkansas State Board of Optometry*, 468 F.Supp. 1254 (E.D.Ark. 1979) (Henley, Eisele, Richard S. Arnold, JJ.), the opposite result was reached, on similar facts.[12] Plaintiffs challenged Arkansas laws which prohibited advertising by optometrists. When suit was commenced, the law was unsettled. After a decision of the Supreme Court resolved the issue, the defendants consented to an Order declaring the statutes to be unconstitutional, and enjoining them from enforcing the statutes. Defendants argued that no attorneys' fees should be recovered "in light of the unsettled state of the law at the time of the filing of the complaint, and in light of the dispatch with which the Defendants moved toward settlement once the Supreme Court spoke definitively on the issue of professional advertising." *Arkansas*, 468 F.Supp. at 1257. The three judge Court rejected this argument, reasoning as follows:

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[12]The decision of the distinguished Court in *Arkansas Community Organizations* was rendered in 1979, soon after the adoption of Section 1988, and prior to the decisions of the Supreme Court in *Hensley* and *Farrar* which have provided further guidance. The opinion thus does not consider the "catalyst" method of analysis.

> "The legislative history, however, makes it clear that the purpose of the Attorney's Fees Act was to ensure that individual Plaintiffs, as 'private attorneys general,' be able to assert and vindicate their civil rights in the courts.... If the law is unsettled, the need for court action to clarify the law and to protect the interest of the Plaintiffs may be greater, not less, than when the rights and duties of the parties are clear. The purpose of the Act is to ensure the enforcement of Plaintiffs' rights, not to punish recalcitrant Defendants. This purpose is served if fees are awarded to successful litigants in litigation which defines or redefines the law."

Id.

The Court of Appeals for the Sixth Circuit affirmed a District Court opinion awarding attorneys' fees under circumstances similar to the Arkansas case. *Putnam v. Davies*, 149 F.3d 1184, 1998 WL 344075 (6th Cir. 1998) (unpub. op.), *affirming* 960 F.Supp. 1268 (S.D.Ohio 1997). In that case, the suit challenged Ohio law which authorized seizure of an innocent owner's car if the driver was convicted of a second offense for drunken driving. While the suit was

pending, the Ohio Supreme Court declared the law unconstitutional. The State Defendants urged that the suit was moot. The District Court disagreed, and entered a judgment in accordance with the decision of the Ohio Supreme Court, and also awarded attorneys' fees. It concluded:

> "This Court will not allow the timing of the issuance of the court's order to negate the status of Plaintiffs as 'prevailing parties,' which in turn, might disallow an award of fees and costs. For the Court to so hold would discourage counsel from accepting cases seeking declaratory judgment and injunctive relief involving the enforcement of alleged unconstitutional state statutes when the same issues are being litigated in the state courts. Such a result would not be in keeping with the interest that Congress ought to promote in the fee statute.
>
> "The fact that others were engaged in parallel efforts to declare the statute unconstitutional in the state courts and prevailed first does not detract from the effort *1020 of the attorneys in trying this case in federal court. Litigation such as this challenging the constitutionality

> of state statutes can take years, and parallel efforts in state and federal courts should not be discouraged. These parallel efforts would be strongly discouraged if one party's attorneys would be deprived of a statutory award of attorney's fees based merely on the fortuitous timing of the two court's judgments."

960 F.Supp. at 1273. The Court of Appeals adopted this reasoning. 149 F.3d 1184, 1998 WL 344075 *4, n.8.

[13] The "good faith" of the Defendants may not be used to deny an award of attorneys' fees. *E.g. Pickett v. Milam*, 579 F.2d 1118 (8th Cir. 1978). We think there is a difference between the good faith search for a correct response presented in these earlier cases, and the facts presented in this case. Here, the law was not unsettled. Until the Supreme Court changed the law in its *Agostini* opinion, the State Defendants, like the lower courts, were under a duty to follow prior Supreme Court precedent that was at odds with the result sought by the Plaintiffs in the litigation.

The Court of Appeals for the Eighth Circuit has stated that the purpose underlying the decision of Congress to provide attorneys' fees for prevailing parties in lawsuits brought under Section 1983 was "to

encourage attorneys to prosecute constitutional *violations*." *Curtis v. City of Des Moines*, 995 F.2d 125, 129 (8th Cir. 1993) (emphasis supplied) (citing, *Venegas v. Mitchell*, 495 U.S. 82, 86, 110 S.Ct. 1679, 109 L.Ed.2d 74 (1990), and *Hensley v. Eckerhart*, 461 U.S. 424, 429, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)). Plaintiffs rely upon this statement of the purpose, but we think they overlook the term "violations," which we have emphasized. The objective of Congress, after all, is not to encourage lawsuits, but rather to encourage public officials to act in accordance with the Constitution, using as an inducement the real threat of litigation, and the possibility of paying attorneys' fees if they *fail* to act in accordance with their duty.

When this action was commenced, the State Defendants were confronted with directly adverse, controlling Supreme Court precedent. Plaintiffs urged them not to follow that precedent, on the ground that the Supreme Court was prepared to repudiate it in the *Agostini* case then pending for decision. All parties were aware, prior to the commencement of the litigation, that the *Agostini* case could lead to a reversal of the *Aguilar* decision. Indeed, that was part of Plaintiffs' legal theory of the case. When the Supreme Court granted certiorari in the *Agostini* case, the parties were also aware that the Supreme Court would be announcing its decision by June, 1997, and that whatever the decision of the Supreme Court, it would

likely have a dispositive effect on this Minnesota litigation.

Whatever may be the merit of the view that parallel proceedings in State and Federal Court challenging the same laws are not to be discouraged, we think the question of the timing of the litigation under the circumstances of this case suggests an additional reason to conclude that there are special circumstances here which warrant denial of attorneys' fees. In *Oxford House-A v. City of University City*, 87 F.3d 1022 (8th Cir. 1996) attorneys' fees were denied for reasons which are factually dissimilar, but on the principle that the litigation was premature.

In this unique case, the idea of encouraging litigation is at odds with the goal of encouraging public officials to act in accordance with applicable decisions of the Supreme Court. Congress could not have intended that a public body could be bound by inconsistent duties--on the one hand the duty to comply with the decisions of the Supreme Court until they are changed, and on the other hand to pay attorneys' fees to a party which brings a lawsuit demanding that they do otherwise.

Reasonableness of the Fee Petition

Defendants urge that attorneys' fees be denied on the ground that Plaintiffs claim for fees is unreasonably high, and that denial of fees is an

appropriate response to such a demand. They contend that the total of $272,000 is unreasonably high in itself, and that this is compounded when one considers that the components of that total include a claim of $62,000 solely for legal fees incurred *1021 in seeking legal fees. They also point out that even though the State Defendants basically agreed to a resolution as of the June 23, 1997 *Agostini* decision, almost 40 hours a week of attorneys' fees are claimed by Plaintiffs for the period June 23 to July 31, at a cost in excess of $50,000. Defendants rely on cases such as *Thelen Oil Co. v. Fina Oil & Chemical Co.*, 962 F.2d 821 (8th Cir. 1992) and *Brown v. Stackler*, 612 F.2d 1057, 1059 (7th Cir. 1980).

Since we conclude that Plaintiffs are not entitled to an award of attorneys' fees on other grounds, it is unnecessary to reach the other arguments of Defendants.

ORDER

Based upon all of the files, records, and proceedings herein,

IT IS HEREBY ORDERED as follows:

1. Plaintiffs' Application for an Award of Attorneys' Fees and Expenses Against the State Defendants [Docket No. 123] is denied; and

2. Pursuant to the provisions of Rule 54(b) of the Federal Rules of Civil Procedure, the Court finds that there is no just reason for delay, and directs that Judgment be entered in accordance with this Order.

LET JUDGMENT BE ENTERED ACCORDINGLY.

THE MERITS DECISIONS BELOW

(Reverse Chronological Order)

35 F.Supp.2d 1134
(Cite as: 35 F.Supp.2d 1134)

Krista **WESTENDORP**; Douglas Westendorp; and Aaron Westendorp, by and through his parents and natural guardians Krista Westendorp and Douglas Westendorp, Plaintiffs,

v.

INDEPENDENT SCHOOL DISTRICT NO. 273 (Edina, MN), Defendant.

Civil No. 4-96-642 (DSD/JMM).
United States District Court,
D. Minnesota.
Dec. 23, 1998.

Disabled student, by his parents as next friends, sued school district, seeking declaratory and injunctive relief for alleged violation of Individuals with Disabilities Education Act (IDEA) in district's refusal to provide special educational services in private parochial school setting. The District Court, 958 F.Supp. 1383, Doty, J., granted summary judgment for district, and student appealed. The Court of Appeals, 155 F.3d 992, Magill, Circuit Judge, reversed and remanded for determination of scope of relief. The District Court held that: (1) district's past violation of preamendment version of IDEA warranted

retrospective equitable relief, and (2) order for district to provide paraprofessional for student for six years, regardless of school, was appropriate.

Motion granted.

[1] SCHOOLS k155.5(5)
345k155.5(5)
School district's past denial of special educational services to disabled student while he attended private sectarian school, in violation of preamendment version of IDEA, warranted retrospective equitable relief in form of compensatory requirement that district provide paraprofessional for student, regardless of school. Individuals with Disabilities Education Act, §601 *et seq.*, 20 U.S.C.A. §1400 *et seq.*

[2] SCHOOLS k8
345k8
Equitable order that school district provide paraprofessional for disabled student for six academic years, regardless of whether student attended public or private religious school, was warranted by district's past refusal, in violation of preamendment version of IDEA, to provide such services to student for three years that he attended private sectarian school, where during three other years student attended public school only because of refusal. Individuals with Disabilities Education Act, §601 *et seq.*, 20 U.S.C.A. §1400 *et seq.*

[2] SCHOOLS k155.5(5)
345k155.5(5)
Equitable order that school district provide paraprofessional for disabled student for six academic years, regardless of whether student attended public or private religious school, was warranted by district's past refusal, in violation of preamendment version of IDEA, to provide such services to student for three years that he attended private sectarian school, where during three other years student attended public school only because of refusal. Individuals with Disabilities Education Act, §601 *et seq.*, 20 U.S.C.A. §1400 *et seq.*

*1135 Daniel L. Bowles, C. Eric Hawes, Larkin Hoffman Daly & Lindgren, Bloomington, MN, for Joan Peter.

Daniel L. Bowles, C. Eric Hawes, Larkin Hoffman Daly & Lindgren, Bloomington, MN, Michael Stokes Paulsen, University of MN Law Center, Minneapolis, MN, J. Matthew Szymanski, Gammon & Grange, McLean, VA, for Sarah Peter, Krista Westendorp, Douglas Westendorp, Aaron Westendorp.

Steven Liss, Rachel Kaplan, MN Attorney General, St. Paul, MN, for Robert Wedl, Arne H. Carlson.

Paul C. Ratwik, Nancy E. Blumstein, Ratwik Roszak & Maloney, Minneapolis, MN, for Independent School District No. 877, ISD No 273.

ORDER

DOTY, District Judge.

This matter is before the court on the motion of plaintiffs for permanent relief on their Individuals with Disabilities Education Act ("IDEA") claim.[1] Based on a review of the file, record, and proceedings herein, and for the reasons stated, the court grants plaintiffs' motion.

BACKGROUND

Aaron Westendorp is a seventh-grade boy who suffers from severe disabilities resulting from a brain stem lesion. He resides with his parents Douglas Westendorp and Krista Westendorp in Edina, Minnesota, within the geographical boundaries of Independent School District No. 273. To function in a school classroom, Aaron requires the services of a full-time paraprofessional. The school district offered to provide the paraprofessional to Aaron if he were to attend a public school. The Westendorps wished, however, for Aaron to attend the Calvin Christian School, a private religious school. With the financial

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[1]Plaintiffs have also brought a motion for expedited briefing and hearing. On good cause shown by the plaintiffs, the court established a slightly accelerated hearing schedule. The briefing was carried out under the time periods dictated by the local rules, except that the plaintiffs had less than five days to reply to the defendant's response memorandum.

assistance of their church, the Westendorps were able to provide for paraprofessional services for Aaron on-site at the private school for the academic years 1991-1992 through 1993-1994. When the Westendorps changed churches, however, they were unable to obtain the financial support necessary *1136 for the services and withdrew Aaron from private school. From the 1994-1995 school year until present, therefore, Aaron has attended public school.

On July 26, 1996, the Westendorps brought this action in federal district court, claiming that the school district had violated their constitutional, IDEA, and state law rights. On March 26, 1997, this court granted summary judgment against the Westendorps on their IDEA claim. On September 2, 1997, the court granted summary judgment against the Westendorps on their remaining claims.

On September 15, 1998, however, the Eighth Circuit reversed these orders and remanded the case with the following instruction regarding the Westendorps' IDEA claim:

> Because we hold that ISD No. 273 violated Aaron's rights under IDEA by denying him a paraprofessional at Calvin Christian School, we must remand to the district court for a determination of the proper scope of relief. The parties have

> stipulated to nominal damages of one dollar.... While the Westendorps continue to seek injunctive relief for this violation, "[t]he remedy of an injunction is preventive and looks only to the future[, and] can not be invoked for the purpose of punishment for wrongful acts already committed." *Minneapolis & St. Louis Ry. Co. v. Pacific Gamble Robinson Co.*, 181 F.2d 812, 814 (8th Cir. 1950). However, the Westendorps have cited to authority which suggests that, under IDEA, equitable relief for past injuries may nevertheless be proper. *See Florence County Sch. Dist. Four v. Carter By and Through Carter*, 510 U.S. 7, 15-16, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993) (citing 20 U.S.C. §1415(e)(2)). We leave the question of a proper remedy in this case to the "broad discretion" of the district court. *Id.*

Peter v. Wedl, 155 F.3d 992, 1001 (8th Cir. 1998). The Westendorps now return to court seeking equitable relief for the school district's past violation of IDEA. Specifically, they request that the court order the school district to provide a paraprofessional to Aaron,

at whatever school his parents choose, for a period of six academic years.[2]

DISCUSSION

As the Eighth Circuit noted, the Westendorps cite to substantial authority supporting the proposition that a district court may grant successful IDEA plaintiffs retrospective equitable relief, including compensatory services. *See, e.g., School Comm. of the Town of Burlington v. Department of Ed.*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985); *Florence County Sch. Dist. Four v. Carter By and Through Carter*, 510 U.S. 7, 15-16, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993); *Miener v. State of Missouri*, 800 F.2d 749 (8th Cir. 1986); *Pihl v. Massachusetts Dept. of Ed.*, 9 F.3d 184, 188 (1st Cir. 1993) (observing that "[c]ourts of appeal in the Second, Third, Sixth, Eighth, and Eleventh Circuits have extended the Supreme Court's rationale in *Burlington* to support the award of

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[2]This requested relief would compensate the Westendorps for the academic years from 1991-1992 through 1996-1997, when the school district denied Aaron special services at the Calvin Christian School. The Westendorps acknowledge that after the 1996-1997 academic year Aaron would no longer have been entitled to the provision of special educational services at a private school because of Congress's 1997 amendments to IDEA. *See Peter v. Wedl*, 155 F.3d at 998.

compensatory education as 'appropriate relief' under the Act" and doing likewise itself).

In *Burlington*, the Supreme Court observed that the pre-amendment version of IDEA "directs the court to 'grant such relief as [it] determines is appropriate.' The ordinary meaning of these words confers broad discretion on the court." 471 U.S. at 369, 105 S.Ct. 1996. It went on to state that "we are confident that by empowering the court to grant 'appropriate' relief Congress meant to include retroactive reimbursement to parents as an available remedy in a proper case." *Id.* at 370-71, 105 S.Ct. 1996. In *Miener*, the leading Eighth Circuit case addressing the issue, the plaintiff sought injunctive relief "directing the defendants to provide compensatory educational services as a remedy for their [earlier] denial of special educational services." 800 F.2d at 752. The court held that such relief was appropriate under IDEA: "The relief Miener seeks is entirely consistent with [the statutory] goal, since she wishes to recover compensatory educational services to remedy denial of the benefits *1137 Congress sought to protect through denying a damages remedy...." *Id.* at 754.

Despite this precedent, the school district contends that IDEA does not afford the Westendorps the remedy they seek. The school district attempts to distinguish *Burlington* and *Miener*, observing that in those cases the defendant failed to offer or provide any

special educational service to the IDEA plaintiff. The school district contrasts those scenarios with the present one, where, it argues, Aaron has at all times been offered or provided a "free appropriate public education."

[1] The problem with the school district's argument is that it has already been rejected by the Eighth Circuit. First, as the Westendorps suggest, the phrase "free appropriate public education" is nothing other than statutory shorthand for compliance with IDEA's requirements. If a school district satisfies IDEA, it has provided a free appropriate public education; if a school district fails to satisfy IDEA, it has not. Second, the Eighth Circuit has expressly rejected the distinction between the quality and the location of services that the School district attempts to make here:

> ISD No. 273's denial of all services to Aaron at Calvin Christian School was not 'comparable' to offering direct services to students at a public school; rather, comparable services would have included the services of a paraprofessional.... ISD No. 273 did not 'provide special education and related services designed to meet the needs of private school children with disabilities residing in [its] jurisdiction,' 34 C.F.R.

> §300.452, but instead only agreed to meet Aaron's needs once he became a public school student. This action is not supported by IDEA or its implementing regulations, and it violated Aaron's rights under IDEA.

Peter v. Wedl, 155 F.3d at 1001. The Eighth Circuit's holding is unequivocal: by failing to provide Aaron special educational services at the Calvin Christian School, the school district violated his IDEA rights and thereby denied him a free appropriate public education. And as *Burlington* and *Miener* instruct, this is precisely the kind of circumstance where retrospective equitable relief is available.[3]

[2] The question thus becomes how much equitable relief the court should grant the Westendorps. The Eighth Circuit has left the "scope of relief" to the court's "broad discretion," citing the Supreme Court's decision in *Florence County*. *Florence County* itself provides additional guidance: "Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be

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[3]Indeed, in *Miener*, the Eighth Circuit concluded that the plaintiff was "*entitled* to recover compensatory educational services" if she were to prevail on her IDEA claim. 800 F.2d at 754 (emphasis added).

required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable." 510 U.S. at 15-16, 114 S.Ct. 361. Among the circuit courts, the presumption appears to be that the "appropriate and reasonable level of reimbursement" will match the quantity of services improperly withheld. *See, e.g., Lester H. v. Gilhool*, 916 F.2d 865, 873 (3d Cir. 1990) ("The court's award merely compensates Lester for what everyone agrees was an inappropriate placement from 1984 through January, 1987 and belatedly allows him to receive the remainder of his free and appropriate public education."). Thus, in this case, where Aaron was denied his IDEA rights for six academic years, the court will presume that he is entitled to six academic years of compensatory relief.

The court has identified only one factor that might argue in favor of departing from this six-year presumption.[4] Viewed solely ***1138** from an economic

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[4]Because it has staked out the extreme position that no relief is appropriate in this case, the school district has remained largely silent as to what factors might counsel less than six years of compensatory relief if one assumes that some relief is warranted. However, the school district does argue that Aaron's needs might change in the future and that, therefore, the award of a paraprofessional for six academic years

Continued on Next Page

standpoint, the school district has already paid for special services during three years of the disputed period, when Aaron attended public school in Edina. If the court were to award the Westendorps six more years of paraprofessional services, the argument might go, it would be requiring the school district to pay for a total of nine years of such services.

The court concludes, however, that this consideration does not justify a reduction in the Westendorps' presumptive relief. The Eighth Circuit has held that the Hobson's Choice created by the

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[4] *Continued from previous page...*

would be premature. The court does not agree. The record clearly establishes that Aaron's disabilities are permanent and that he will require the services of a full-time paraprofessional in order to successfully attend school. Moreover, as the Westendorps point out, the equitable relief the court may grant in this case is retrospective; that is, the court may look only to the past violation of IDEA rights, with the goal of curing the earlier deprivation. And as to the issue of past injury, the parties have never disagreed that Aaron required the services of a full-time paraprofessional during the period that the school district denied him special educational services at the Calvin Christian School. Therefore, the court is satisfied that the services of a paraprofessional should provide the substantive component of its order for relief.

school district's policy denied Aaron his IDEA rights in the same way that an outright refusal would have. Although Aaron received three years of special services in public school after the Westendorps were forced to capitulate to the School district's policy, it was the school district, not the Westendorps, who bore the risk that this conditional provision of services might ultimately be determined invalid. Accordingly, equity dictates that Aaron be compensated for all six of the academic years that the school district violated his IDEA rights.[5]

CONCLUSION

For the foregoing reasons, it is hereby ordered that:

1. Plaintiffs' motion for expedited briefing and hearing is granted in part.

2. Plaintiffs' motion for permanent relief on their IDEA claim is granted. Defendant Independent School District No. 273 is hereby ordered to provide a classroom paraprofessional aide to Aaron Westendorp at the school chosen by his parents, whether public or private (including religious), for the equivalent of six academic years.

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[5]Although damages are not available under IDEA, *see Miener*, 800 F.2d at 752, the court will enforce the agreement between the parties and award plaintiffs one dollar in stipulated damages.

3. Defendant shall pay one dollar in stipulated damages to plaintiffs.

155 F.3d 992
(Cite as: 155 F.3d 992)

Joan **PETER**; Sarah Peter, a minor, by and through her parent and natural guardian Joan Peter, Plaintiffs, Krista Westendorp; Douglas Westendorp; Aaron Westendorp, a minor, by and through his parents and natural guardians Krista Westendorp and Douglas Westendorp, Appellants,

v.

Robert **WEDL**, Commissioner, Minnesota Department of Children, Families and Learning; Arne Carlson, Governor, State of Minnesota; Independent School District, No. 877, Buffalo, Minnesota, Defendants, Independent School District, No. 273, Edina, Minnesota, Appellees.

No. 97-3608.

United States Court of Appeals,

Eighth Circuit.

Submitted June 11, 1998.

Decided Sept. 15, 1998.

Petition for Rehearing and Suggestion for Rehearing En Banc Denied Oct. 27, 1998. [FN*]

FN* Judges Fagg, Loken, and Murphy would grant the suggestion for rehearing en banc.

Disabled student, by his parents as next friends, sued school district, seeking declaratory, injunctive, and monetary relief for alleged violations of free

speech and free exercise clauses of First Amendment, Equal Protection Clause of Fourteenth Amendment, and Individuals with Disabilities Education Act (IDEA) occasioned by refusal of state and school districts to provide special educational services in private parochial school setting. The United States District Court for the District of Minnesota, David Doty, J., granted district's motion for summary judgment, 958 F. Supp. 1383. Student appealed. The Court of Appeals, Magill, Circuit Judge, held that: (1) question of material fact as to whether district was motivated by religious animus in denying student special educational services precluded grant of summary judgment on student's constitutional claims; (2) amended version of IDEA did not entitle student to publicly-funded special education services in private parochial school setting; (3) preamendment version of IDEA entitled student to services in private parochial school setting; and (4) remand of IDEA claim for determination of damages was required.

Reversed and remanded.

Ross, Circuit Judge, dissented with opinion.

[1] CONSTITUTIONAL LAW k84.1
92k84.1

Government discrimination based on religion violates Free Exercise Clause of First Amendment, Free Speech Clause of First Amendment, and Equal Protection Clause of Fourteenth Amendment. U.S.C.A. Const.Amends. 1, 14.

[1] CONSTITUTIONAL LAW k225.1
92k225.1
Government discrimination based on religion violates Free Exercise Clause of First Amendment, Free Speech Clause of First Amendment, and Equal Protection Clause of Fourteenth Amendment. U.S.C.A. Const.Amends. 1, 14.

[2] FEDERAL CIVIL PROCEDURE k2491.5
170Ak2491.5
Question of material fact as to whether school district was motivated by religious animus in denying paraprofessional services to disabled student attending private parochial school precluded grant of summary judgment on student's claims of free exercise, free speech, and equal protection violations, where version of state statute claimed by district as independent motivation for denial of services was unconstitutional, and district did not apply its purported policy of refusing services to all private school students to disabled students attending private nonreligious schools. U.S.C.A. Const.Amends. 1, 14; Minn.R. 3525.1150.

[3] SCHOOLS k154(4)
345k154(4)
Disabled student was not entitled, under amendments to Individuals with Disabilities Education Act (IDEA), to receive publicly-funded special education services in private parochial school setting, where local school

district made free appropriate public education (FAPE) mandated by IDEA available to student, and parents elected to enroll student in private parochial school. Individuals with Disabilities Education Act, §612(a)(10)(C)(i), as amended, 20 U.S.C.A. §1412(a)(10)(C)(i).

[4] SCHOOLS k154(4)
345k154(4)
Court of Appeals would not, in interpreting provisions of prior version of Individuals with Disabilities Education Act (IDEA) governing provision of educational services in parochial school setting, give retroactive effect to amendments thereto, or to rationale behind those amendments. Individuals with Disabilities Education Act, §§612(a)(10)(C)(i), 613(a)(2), as amended, 20 U.S.C.A. §§1412(a)(10)(C)(i), 1413(a)(2).

[5] SCHOOLS k154(4)
345k154(4)
Disabled student voluntarily enrolled in private parochial school by his parents was entitled, under preamendment version of Individuals with Disabilities Education Act (IDEA), to receive special education services comparable in quality, scope, and opportunity for participation to those services provided to public school students, in absence of any individualized determination by school district of how best to meet student's needs; due to nature of his disability, student

required one-on-one assistance throughout school day, which could not be provided off-site, and cost of providing services was identical on- and off-site. Individuals with Disabilities Education Act, §613(a)(4)(A), as amended, 20 U.S.C.A. §1413(a)(4)(A); 34 C.F.R. §76.654(a).

[6] SCHOOLS k155.5(5)
345k155.5(5)

Remand of disabled student's claim against school district under Individuals with Disabilities Education Act (IDEA) was required for determination of proper scope of relief for district's violation of preamendment version of IDEA; parties stipulated to nominal damages of one dollar, injunctive relief sought by student was not available as punishment for wrongs already committed, and some form of equitable relief was at least potentially within broad discretion of district court. Individuals with Disabilities Education Act, §615(e)(2), as amended, 20 U.S.C.A. §1415(e)(2).

[7] CONSTITUTIONAL LAW k82(10)
92k82(10)

Parents have constitutional right to choose the education their children receive; parents and guardians of children are at liberty to direct children's upbringing and education, and state lacks any general power to standardize its children by forcing them to accept instruction from public teachers only.

[7] PARENT AND CHILD k1
285k1
Parents have constitutional right to choose the education their children receive; parents and guardians of children are at liberty to direct children's upbringing and education, and state lacks any general power to standardize its children by forcing them to accept instruction from public teachers only.

[7] SCHOOLS k4
345k4
Parents have constitutional right to choose the education their children receive; parents and guardians of children are at liberty to direct children's upbringing and education, and state lacks any general power to standardize its children by forcing them to accept instruction from public teachers only.

[8] CONSTITUTIONAL LAW k82(1)
92k82(1)
While government may not deny a benefit to a person because he exercises a constitutional right, government's decision not to subsidize exercise of fundamental right does not infringe the right, and thus is not subject to strict scrutiny.

*994 Michael S. Paulsen, Minneapolis, MN, argued (Daniel L. Bowles, Daniel T. Kadlec, Bloomington, MN, on the brief), for Appellants.

Paul C. Ratwik, Minneapolis, MN, argued (Brian D. Maguire, Minneapolis, MN, on the brief), for Appellees.

Before BEAM, ROSS, and MAGILL, Circuit Judges.

MAGILL, Circuit Judge.

Aaron Westendorp is a severely disabled child who requires a full-time paraprofessional to function in a school classroom. Minnesota Independent School District No. 273 (ISD No. 273) refused to provide Aaron with a paraprofessional as long as he attended a private religious school, and Aaron's parents brought this suit for damages and equitable relief against the school district. The Westendorps alleged that, by denying Aaron a paraprofessional in his private religious school, ISD No. 273 violated their rights of free speech, free exercise of religion, and equal protection under the First and Fourteenth Amendments, as well as their rights under the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§2000bb to 2000bb-4 (1994), the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§1400-1491o (1994), and Minnesota state law. The district court granted summary judgment in favor of ISD No. 273, and Aaron's parents now appeal. We reverse.

I.

Aaron is a twelve-year-old boy who lives in Edina, Minnesota. Aaron suffers from a brain stem lesion which causes spastic quadriparesis, a partial paralysis from the eyes down. Although Aaron has normal cognitive abilities, he cannot speak, and communicates through finger signing. He breathes through a tracheostomy tube and eats through a gastrostomy tube. Because of his severe physical disabilities, Aaron requires a full-time paraprofessional while in school. The paraprofessional assists Aaron with his disabilities, translates his finger spelling, and adapts classroom tasks for Aaron. The cost of a paraprofessional is approximately $10,000 per year, and is the same whether Aaron attends a public school or a private school.

Aaron's parents wish him to attend Calvin Christian School, a K-8 private religious school in Edina. Aaron's two sisters attended Calvin Christian School, and Aaron was able to attend the school from 1991 until 1994. During this time, the Westendorps' church paid for Aaron's paraprofessional. When the Westendorps changed churches, however, the burden to pay for the paraprofessional fell on them. With help from relatives, the Westendorps could afford Aaron's tuition, but they could not afford the cost of a paraprofessional. Because ISD No. 273 would not pay for a paraprofessional for Aaron if he attended Calvin Christian School, the Westendorps were forced to

transfer Aaron to a public school in Edina. Aaron has attended an Edina public school, with the services of an ISD No. 273-funded paraprofessional, from 1994 until the present.

When ISD No. 273 first refused to provide Aaron a paraprofessional if he attended Calvin Christian School, Minnesota law prohibited school districts from providing such services at private religious schools. *See* Minn. R. 3525.1150 subpt. 2 (allowing special education services only at a "neutral site"); Minn.Stat. §123.932 subdivision 9 (defining "neutral site" as "a public center, a nonsectarian nonpublic school, a mobile unit located off the nonpublic school premises, or any other location off the nonpublic school premises which is neither physically nor educationally identified with the functions of the nonpublic school"). Wayne Erickson, the manager of the Division of Special Education in the Minnesota Department of Children, Families and Learning, explained that, under this rule, a school district "[m]ay not provide special instruction services in a nonpublic school if that nonpublic school is a religious or sectarian school." Erickson Dep. (May 22, 1997) at 46, reprinted in J.A. at 270. By contrast, where a student in a private nonreligious school required special education services that "can very easily be provided in the child's regular classroom without impairing [the child's] ability to operate," Erickson stated that "it would be the state's policy it

*995 should be provided in the regular classroom." *Id.* at 57-58, reprinted in J.A. at 281-82; *see also* Minn. R. 3525.1150 subpt. 1 (providing that school districts must "make available special education to all students who are disabled regardless of whether they attend a nonpublic school").

Penny Kodrich, the Director of Special Services for ISD No. 273, acknowledged that Minnesota Rule 3525.1150 prohibited ISD No. 273 from providing services to Aaron at Calvin Christian School, *see* Kodrich Dep. (July 17, 1997) at 68-69, reprinted in J.A. at 453-54, and that Minnesota Rule 3525.1150 was an "independent rationale for the School District's policy" of refusing services at private schools. *See* Kodrich Aff. (July 17, 1997) ¶6, reprinted in J.A. at 152-53. However, Kodrich also asserted that, in order to ensure the quality and integration of services and to contain costs: It has been the consistent policy of Independent School District 273 to not provide direct on-site special education and related services to disabled school-age students who have been placed by their parents or guardians in private schools. That policy applies to all private school[s] regardless of whether they are religious or secular in nature. *Id.* ¶2, reprinted in J.A. at 150.

Despite its unwritten "consistent policy" of not providing special education services to students at private schools, ISD No. 273 has provided special

education services to students at private nonreligious preschools, *see* ISD No. 273's Answers to Pls.' First Set of Interrogs. (June 15, 1997) at 2, reprinted in J.A. at 521 ("the School District has provided students who were placed by their parents in non-sectarian private preschool programs with direct on-site special education and related services"), as well as at the homes of home-schooled disabled children. *See* Kodrich Dep. at 122, reprinted in J.A. at 507. While Kodrich admitted that at least one other disabled student had been denied paraprofessional services at a private religious school by ISD No. 273, Kodrich could not recall any student who had been denied paraprofessional services at a private nonreligious school. *See id.* at 73-78, reprinted in J.A. at 458-63.

On July 26, 1996, the Westendorps brought this suit against ISD No. 273 and the State of Minnesota, seeking injunctive and declaratory relief and damages. The Westendorps were joined in their suit against the state by the parents of Sarah Peter, a disabled Minnesota child who was similarly denied special education services at a private religious school by Independent School District No. 877 (ISD No. 877).

On March 26, 1997, the district court granted summary judgment against the Westendorps on their IDEA claim. *See Peter v. Johnson*, 958 F.Supp. 1383, 1399-1400 (D.Minn. 1997). The district court concluded "that the statute and its regulations do not

require the State defendants or local school districts to provide on-site paraprofessional services to the plaintiffs at private schools as a component of their individualized education program." *Id.*

On June 23, 1997, the Supreme Court held that public school districts may provide secular teaching services at a private religious school without offending the Establishment Clause. *See Agostini v. Felton*, 521 U.S. 203, 117 S.Ct. 1997, 2016, 138 L.Ed.2d 391 (1997). Following this decision, the State of Minnesota, ISD No. 273, and ISD No. 877 stipulated to an injunction against the enforcement of Minnesota Rule 3525.1150. On August 5, 1997, the district court granted a preliminary injunction providing that "[t]he State Defendants are hereby enjoined and restrained from enforcing Rule 3525.1150 insofar as it prohibits provision of special education services to Plaintiffs Sarah Peter and Aaron Westendorp on the premises of a private religious school." Order (Aug. 5, 1997) at 1, reprinted in Appellants' Addendum at 48. Minnesota Rule 3525.1150 was subsequently amended to no longer distinguish between private religious schools and private nonreligious schools. Following the district court's grant of the injunction, ISD No. 877 agreed to provide services to Sarah Peter at her private religious school, and the Westendorps and ISD No. 273 became the sole parties to this suit.

Despite the injunction and ISD No. 877's change of heart, ISD No. 273 continued to refuse to provide services to Aaron if he *996 attended Calvin Christian School. The district court denied a preliminary injunction requiring ISD No. 273 to provide such services, see Order (Aug. 12, 1997) at 9, reprinted in Appellants' Addendum at 58, and subsequently granted summary judgment against the Westendorps' remaining constitutional and state law claims. *See* Order (Sept. 2, 1997) at 2-3, reprinted in Appellant's Addendum at 60-61.

The Westendorps now appeal the grant of summary judgment against them on their free speech, free exercise, equal protection, and IDEA claims. Following the Supreme Court's decision that RFRA is unconstitutional as applied to state law, *see City of Boerne v. Flores*, 521 U.S. 507, ___, 117 S.Ct. 2157, 2172, 138 L.Ed.2d 624 (1997), the plaintiffs abandoned their RFRA claim. *See* Order (Aug. 12, 1997) at 4, reprinted in Appellants' Addendum at 53. In addition, the Westendorps have abandoned their state law claims for prospective relief, *see* Pls.' Fed. R.App. P. 28(j) Letter (June 5, 1998) at 1, following the amendment of Minnesota's special education provisions. *See* 1998 Minn. Sess. Law Serv. Ch. 398 (H.F.2874) art. 2, §53(a) (West) (providing that Minnesota law will no longer "impose requirements that exceed federal law").

II.

This Court reviews the district court's grant of summary judgment de novo. *See Kraft v. Ingersoll-Rand Co.*, 136 F.3d 584, 585 (8th Cir. 1998). Summary judgment is only proper if, taking the evidence "in the light most favorable to the nonmoving party, there is no genuine issue of material fact, and the movant is entitled to judgment as a matter of law." *Id.* at 586. "At the summary judgment stage, the court should not weigh the evidence, make credibility determinations, or attempt to determine the truth of the matter. Rather, the court's function is to determine whether a dispute about a material fact is genuine...." *Quick v. Donaldson Co.*, 90 F.3d 1372, 1376-77 (8th Cir. 1996). "[A] genuine issue of material fact exists if: (1) there is a dispute of fact; (2) the disputed fact is material to the outcome of the case; and (3) the dispute is genuine, that is, a reasonable jury could return a verdict for either party." *RSBI Aerospace, Inc. v. Affiliated FM Ins. Co.*, 49 F.3d 399, 401 (8th Cir. 1995).

In their complaint, the Westendorps alleged that ISD No. 273's "policies and actions violate Plaintiffs' rights under the equal protection clause of the Fourteenth Amendment to the U.S. Constitution." Compl. (July 25, 1997) ¶51, reprinted in J.A. at 29. We conclude that the district court erred in granting summary judgment against the Westendorps on this claim.

[1] Prior to the district court's injunction against the enforcement of Minnesota Rule 3525.1150 and the rule's subsequent amendment, Minnesota Rule 3525.1150 explicitly discriminated against children who attended private religious schools. While children who attended private nonreligious schools could receive government-funded special education services directly at their private schools, students like Aaron could not. Government discrimination based on religion violates the Free Exercise Clause of the First Amendment, *see Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) ("the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general"), the Free Speech Clause of the First Amendment, *see Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 830, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) ("ideologically driven attempts to suppress a particular point of view are presumptively unconstitutional in funding, as in other contexts" (quotations omitted)), and the Equal Protection Clause of the Fourteenth Amendment. *See Native American Council of Tribes v. Solem*, 691 F.2d 382, 384 (8th Cir. 1982); *cf. Romer v. Evans*, 517 U.S. 620, 633, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996) ("Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.... A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial

of equal protection of the laws in the most literal sense." (quotations and citations omitted)).

"[I]f the object of a law is to infringe upon or restrict practices because of their religious *997 motivation, the law is not neutral, and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." *Lukumi*, 508 U.S. at 533, 113 S.Ct. 2217 (citation omitted). The only compelling interest identified by the State of Minnesota to justify Minnesota Rule 3525.1150 was that the rule was necessary to avoid a violation of the Establishment Clause. *See* Tr. of Mot. Hr'g (Nov. 8, 1996) at 35-36, reprinted in J.A. at 190-91. This position was highly questionable in light of the Supreme Court's decision in *Zobrest v. Catalina Foothills School District*, 509 U.S. 1, 10, 113 S.Ct. 2462, 125 L.Ed.2d 1 (1993) (holding that the government can provide a sign language interpreter to a disabled student at a private religious school without violating the Establishment Clause), and the State of Minnesota abandoned this argument following the Supreme Court's decision in *Agostini*, 117 S.Ct. at 2016 (holding that the Establishment Clause was not violated when public teachers taught nonreligious subjects at private religious schools). Because Minnesota Rule 3525.1150 cannot be justified as a narrowly tailored means of avoiding a violation of the Establishment Clause, it violated the plaintiffs' rights to free exercise of religion, free speech, and equal

protection, and the district court properly enjoined its enforcement.

[2] If ISD No. 273 denied a paraprofessional to Aaron Westendorp at Calvin Christian School because of Minnesota Rule 3525.1150's unconstitutional distinction between private religious schools and private nonreligious schools, or otherwise because of the religious nature of Calvin Christian School, then ISD No. 273's action is illegal and the plaintiffs are entitled to the relief that they seek. ISD No. 273 conceded that it relied on Minnesota Rule 3525.1150 when it denied services to Aaron at Calvin Christian School, *see* Kodrich Aff. ¶6, reprinted in J.A. at 152-53 (Minnesota Rule 3525.1150 was an "independent rationale for the School District's policy"), and further conceded that Minnesota Rule 3525.1150 prevented it from providing services to Aaron at Calvin Christian School. *See* Kodrich Dep. at 68-69, reprinted in J.A. at 453-54. ISD No. 273 nevertheless contends that in denying services to Aaron it "followed its long-standing policy, which it maintains today, of not providing direct, on-site special education and related services at private schools, regardless of their religious or secular orientation." Appellee's Br. at 3.

ISD No. 273's invocation of a "long-standing policy" rings hollow in light of its actual practice of providing services to disabled children at private

nonreligious preschools and at home schools. Indeed, ISD No. 273's alleged policy has not been used to deny students at private nonreligious schools paraprofessional services, and appears to manifest itself only when disabled children at private religious schools request these services. While ISD No. 273 has alleged that it created its policy to ensure the quality and integration of services and to contain costs, *see Kodrich* Aff. PP 3-5, reprinted in J.A. at 150-52, this appears to be a mere ad hoc rationalization of an irrational practice. ISD has not attempted to explain how the goals of its alleged policy are served by denying services to students at private religious schools but allowing these services to students at home schools or at private nonreligious preschools, and there is no evidence that any of these goals are furthered by denying Aaron a paraprofessional at Calvin Christian School. It is undisputed that the cost to ISD No. 273 is the same whether it funds a full-time, one-on-one paraprofessional for Aaron at Calvin Christian School or at a public school, and ISD No. 273 has not argued that the services of a paraprofessional would be of a lower quality at Calvin Christian School than if they were provided by the same paraprofessional at a public school, or that the integration of Aaron's services would somehow be impaired at Calvin Christian School. Indeed, Kodrich admitted that she knew "[v]ery little" about Aaron's disabilities, Kodrich Dep. at 50, reprinted in J.A. at 435, and she expressed no

knowledge of the opportunities offered by Calvin Christian School.

Viewed in its entirety, the evidence in this case strongly suggests that ISD No. 273's policy is a mere pretext for religious discrimination. *Cf. Lukumi*, 508 U.S. at 534, 113 S.Ct. 2217 ("The Free Exercise Clause protects against governmental hostility which is masked as well as overt."). We must therefore *998 reject the district court's conclusion that "there is no evidence in the record that [ISD No. 273] treated children differently on the basis of whether they attended nonpublic nonreligious schools or nonpublic religious schools, notwithstanding the language of Rule 3525.1150." Order (Aug. 12, 1997) at 6, reprinted in Appellants' Addendum at 55. Because "[s]ummary judgment is notoriously inappropriate for determination of claims in which issues of intent, good faith and other subjective feelings play dominant roles," *Pfizer, Inc. v. Rectifier Corp. (In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions)*, 538 F.2d 180, 185 (8th Cir. 1976), we may not grant summary judgment to the Westendorps on this claim, despite the strength of the evidence suggesting that Aaron has been the victim of invidious discrimination. Accordingly, we remand this matter to the district court for a factual determination of whether ISD No. 273 based its denial of services to Aaron at Calvin Christian School on its purported religion-neutral policy, or if its denial was

based on the religious animus contained in Minnesota Rule 3525.1150.[1]

III.

The Westendorps also appeal the district court's grant of summary judgment on their claim under IDEA. IDEA is designed to encourage states to develop special education programs for disabled students. In return for federal funding, IDEA requires participating states to have "in effect a policy that assures all children with disabilities the right to a free appropriate public education." 20 U.S.C. §1412(1) (1994). While the parties agree that Aaron has a disability and that he is entitled under IDEA to the services of a paraprofessional paid by ISD No. 273,

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[1]Although the record reveals an obvious dispute regarding ISD No. 273's motivation for denying Aaron a paraprofessional at Calvin Christian School, the parties stipulated, without providing any recitation of facts, "that the material facts of this case are not in dispute, and that the record before the Court" is complete. Stipulation (Aug. 29, 1997) at 3, reprinted in J.A. at 630. While "stipulations of fact fairly entered into are controlling and conclusive," *Sims v. Wyrick*, 743 F.2d 607, 610 (8th Cir. 1984), a stipulation that is devoid of facts provides little direction for this Court. Because there exists in this case a disputed question of material fact that is not answered by the parties' stipulation, summary judgment was improperly granted.

they disagree on whether IDEA entitles him to those services at Calvin Christian School.

[3] On June 4, 1997, three months after the district court granted summary judgment against the Westendorps on their IDEA claim, comprehensive amendments to IDEA became law. *See* Individuals with Disabilities Education Act Amendments of 1997, Pub.L. No. 105-17, 111 Stat. 37 (1997). In amending IDEA, Congress substantially limited the rights of disabled children enrolled by their parents in a private school. *See* 20 U.S.C.A. §1412(a)(10)(C)(i) (West Supp. 1998) (IDEA will "not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility"). In *Foley v. Special School District of St. Louis County*, 153 F.3d 863 (8th Cir. 1998), this Court held that "[t]he 1997 Amendments expressly provide that public school agencies are not required to pay the costs of special education services for a particular child," and that disabled children and their "parents now have no individual right under IDEA to [specific] special education and related services ..., so they have no right to a federal court decree mandating that those services be provided at a particular location." *Id.* at 865. Accordingly, Aaron has no right under the 1997

Amendments to receive ISD No. 273-funded services at Calvin Christian School.

[4] We must address, however, whether ISD No. 273 engaged in violations of IDEA as it existed prior to its amendment in 1997. Because "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one," *South Dakota v. Yankton Sioux Tribe*, ___ U.S. ___, ___, 118 S.Ct. 789, 803, 139 L.Ed.2d 773 (1998) (quotations omitted), we reject ISD No. 273's argument that our interpretation of the pre-amendment version of IDEA is controlled by the 1997 amendments. *See Fowler v. Unified Sch. Dist. No. 259*, 128 F.3d 1431, 1436 (10th Cir. 1997) (1997 amendments to IDEA *999 are to be applied "only to events occurring after [their] effective date").

IDEA had the "goal of providing a free appropriate public education for all children with disabilities." 20 U.S.C. §1413(a)(2) (1994). "The word 'public' is a term of art which refers to 'public expense,' whether at public or private schools." *Dreher v. Amphitheater Unified Sch. Dist.*, 22 F.3d 228, 233 n.10 (9th Cir. 1994). States receiving grants under IDEA had to "provide that all children residing within the jurisdiction of the local educational agency or the intermediate educational unit who are disabled, regardless of the severity of their disability, and are in need of special education and related services will be

identified, located, and evaluated," 20 U.S.C. §1414(a)(1)(A) (1994), and had to "establish a goal of providing full educational opportunities to all children with disabilities." 20 U.S.C. §1414(a)(1)(C) (1994).

The pre-amendment version of IDEA required participating states to provide special education services to private school students. Disabled students enrolled by the state in private schools were entitled to publicly-funded special education services "at no cost to their parents or guardian," 20 U.S.C. §1413(a)(4)(B) (1994), while disabled students enrolled in private schools by their parents were also entitled to participate in publicly-funded special education programs "to the extent consistent with the number and location of children with disabilities in the State who are enrolled in private elementary and secondary schools." 20 U.S.C. §1413(a)(4)(A) (1994).

In implementing IDEA, the Department of Education promulgated regulations requiring school districts to "provide special education and related services designed to meet the needs of private school children with disabilities residing in" their jurisdictions. 34 C.F.R. §300.452 (1996). In meeting the needs of disabled students enrolled by their parents in private schools, school districts were required to provide services that were "comparable in quality, scope, and opportunity for participation to the program benefits that the subgrantee provides for students

enrolled in public schools." 34 C.F.R. §76.654(a) (1996). Consistent with IDEA, the availability of these services was nevertheless limited by the "number and location" of disabled children in the state. 34 C.F.R. §300.451(a) (1996); *see also* 34 C.F.R. §76.651(a)(2) (1996) (school districts "shall provide that opportunity to participate in a manner that is consistent with the number of eligible private school students and their needs"). While some services could be provided to private school students at public schools, school districts were also allowed to provide special education services to students at private schools. *See* 34 C.F.R. §76.659(a), (b) (1996).

Several courts have considered whether the pre-amendment version of IDEA entitled a disabled student enrolled by his parents in a private school to publicly-funded services at the private school. In *Fowler v. Unified School District No. 259*, 107 F.3d 797 (10th Cir.), *vacated and remanded for reconsideration in light of 1997 Amendments to IDEA*, ___ U.S. ___, 117 S.Ct. 2503, 138 L.Ed.2d 1008, *and on remand*, 128 F.3d 1431 (10th Cir. 1997) (reaffirming prior decision), the Tenth Circuit held "that the IDEA and its regulations create no automatic right to any and all special education services at a private school site for all students voluntarily attending such a school." *Id.* at 805. However, the court went on to "reject the proposition that the District has unfettered discretion to simply deny [services to a

disabled student at a private school], and claim to have fulfilled its obligations under the IDEA by offering those services to [the student] at a public school." *Id.* at 806. The court explained: [W]e are faced here with the question of whether an individual disabled child, who requires an individualized service which only benefits him if it is provided to him on-site, throughout his educational day, is entitled to that individualized service at the private school he has chosen to attend. We conclude that, in such a situation, the District must pay for that service an amount up to, but not more than, the average cost to the District to provide that same service to [similarly-disabled] students in the public school setting. *Id.* at 807-08. On remand from the Supreme Court, the Tenth Circuit held that the 1997 amendments to IDEA did not affect a disabled ***1000** student's rights under the pre-amendment version of IDEA, and reinstated its earlier analysis. *See Fowler*, 128 F.3d at 1436.

In *Russman ex rel. Russman v. Sobol*, 85 F.3d 1050, 1056 (2d Cir. 1996), *vacated and remanded for reconsideration in light of 1997 Amendments to IDEA sub nom. Board of Educ. of the Enlarged City Sch. Dist. v. Russman ex rel. Russman*, ___ U.S. ___, 117 S.Ct. 2502, 138 L.Ed.2d 1008 (1997), *and on remand sub nom. Russman v. Mills*, 150 F.3d 219 (2d Cir. 1998), the Second Circuit held that pre-amendment IDEA and its implementing regulations are more consistent with mandatory entitlements than with

discretionary authority. Where the cost of special services does not vary with where they are provided, the IDEA and regulations regarding voluntary private school students make little sense if such services may be made available only in the public schools. The statute and regulations require that necessary services be provided to disabled private school students according to their needs rather than the name of their school, and state that such services must be "comparable in quality, scope, and opportunity for participation" to those offered to public school students. 34 C.F.R. §76.654. Use of the word "comparable" strongly suggests that the provision of services will usually take place outside the public school. Otherwise, the regulation would simply provide that any services for the disabled available at a public school must be open to private school students. *Id.* at 1056-57 (citation omitted). On remand, however, the court held that "IDEA as amended does not require a school district to provide on- site special-education services to a disabled child voluntarily enrolled in private school." *Russman*, 150 F.3d at 220.

Other courts, however, held that pre-amendment IDEA did not require a school district to provide services to parentally-enrolled disabled students at private schools. *See K.R. ex rel. M.R. v. Anderson Community Sch. Corp.*, 81 F.3d 673, 678 (7th Cir. 1996), *vacated and remanded for reconsideration in light of 1997 Amendments to IDEA*, ___ U.S. ___, 117 S.Ct. 2502, 138 L.Ed.2d 1007, *and on remand*, 125

F.3d 1017 (7th Cir. 1997) (reaffirming prior decision), *cert. denied*, ___ U.S. ___, 118 S.Ct. 1360, 140 L.Ed.2d 510 (1998); *Cefalu ex rel. Cefalu v. East Baton Rouge Parish Sch. Bd.*, 117 F.3d 231, 233 (5th Cir. 1997) (reconsidering prior opinion in light of 1997 amendments to IDEA, and holding that school district was not required to provide services to a disabled student at a private school).

[5] We are persuaded that "Congress clearly intended that disabled students voluntarily placed in a private school by their parents [were] to be active participants in and beneficiaries of programs established under the IDEA." *Fowler*, 107 F.3d at 805 (quotations omitted). IDEA was clear that, "consistent with the number and location of" disabled students enrolled by their parents in private schools, students like Aaron had a right to publicly-funded special education services. *See* 20 U.S.C. §1413(a)(4)(A). While Aaron's rights may not have been identical to those of a disabled child enrolled in a private school by the state, *see Fowler*, 107 F.3d at 805, he was nevertheless entitled to special education services that were "comparable in quality, scope, and opportunity for participation" to those services provided to public school students. 34 C.F.R. §76.654(a).[2]

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[2]ISD No. 273 has relied on interpretive letters issued by the Department of Education which contend

Continued on Next Page

***1001** Under the plain language of IDEA and its implementing regulations, Aaron was entitled to receive services as a private school student. Because of the nature of his disability, Aaron required one-on-one assistance from a paraprofessional throughout his

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[2] Continued from previous page...

that "[t]hese regulations do not confer on every parentally-placed child with a disability an individual entitlement to services." Letter to Burch, 23 Individuals with Disabilities Educ. L. Rep. 560, 562 (1995); *see also* Letter to McConnell, 22 Individuals with Disabilities Educ. L. Rep. 369, 369 (1994) ("parentally-placed children with disabilities do not have an individual entitlement to services"). Because the regulations implementing IDEA were clear that parentally-enrolled private school students with disabilities were entitled to "comparable" services, 34 C.F.R. §76.654(a), we must reject the Department of Education's suggestion that no such entitlement exists. *See Shalala v. St. Paul-Ramsey Med. Ctr.*, 50 F.3d 522, 529 (8th Cir. 1995) (although we accept agency interpretations of ambiguous regulations unless they are clearly erroneous, "we are not at liberty to allow the agency to imply language that does not exist in the regulation" (quotations omitted)); *see also Newton v. Chater*, 92 F.3d 688, 693 (8th Cir. 1996) ("While courts must give deference to an agency's interpretation of its own regulations, courts are not bound by them and they are not conclusive.").

school day. Accordingly, off-site assistance could not meet his special education needs if Aaron were to remain a private school student. While school districts "can and must have considerable discretion in determining how best to serve disabled students," *Fowler*, 107 F.3d at 807, there is nothing in this record to suggest that ISD No. 273 ever considered how "best" to serve Aaron. Rather, it simply denied him services at Calvin Christian School because it is a private religious school. Here, there is no evidence that ISD No. 273 denied services at Calvin Christian School because "economies of scale, or geographical considerations, [made] it economically infeasible to provide certain services at private school locations." *Id.* at 807 n.11. Rather, ISD No. 273 would have denied services to any disabled student at a private religious school, regardless of the circumstances of the individual case.

ISD No. 273's denial of all services to Aaron at Calvin Christian School was not "comparable" to offering direct services to students at a public school; rather, comparable services would have included the services of a paraprofessional. *See Russman*, 85 F.3d at 1056 ("Where the cost of special services does not vary with where they are provided, the IDEA and regulations regarding voluntary private school students make little sense if such services may be made available only in the public schools."). ISD No. 273 did not "provide special education and related services

designed to meet the needs of private school children with disabilities residing in [its] jurisdiction," 34 C.F.R. §300.452, but instead only agreed to meet Aaron's needs once he became a public school student. This action is not supported by IDEA or its implementing regulations, and it violated Aaron's rights under IDEA.

[6] Because we hold that ISD No. 273 violated Aaron's rights under IDEA by denying him a paraprofessional at Calvin Christian School, we must remand to the district court for a determination of the proper scope of relief. The parties have stipulated to nominal damages of one dollar. *See* Stipulation (Aug. 29, 1997) at 2, reprinted in J.A. at 629. While the Westendorps continue to seek injunctive relief for this violation, "[t]he remedy of an injunction is preventive and looks only to the future[, and] can not be invoked for the purpose of punishment for wrongful acts already committed." *Minneapolis & St. Louis Ry. Co. v. Pacific Gamble Robinson Co.*, 181 F.2d 812, 814 (8th Cir. 1950). However, the Westendorps have cited to authority which suggests that, under IDEA, equitable relief for past injuries may nevertheless be proper. *See Florence County Sch. Dist. Four v. Carter ex rel. Carter*, 510 U.S. 7, 15-16, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993) (citing 20 U.S.C. §1415(e)(2)). We leave the question of a proper remedy in this case to the "broad discretion" of the district court. *Id.* (quotations omitted).

IV.

[7] Finally, the Westendorps argue that, even if ISD No. 273's actions were not motivated by religious animus, its refusal of a paraprofessional to Aaron at Calvin Christian School violates the constitution by conditioning the receipt of generally available government services on the Westendorps' foregoing of a constitutional right. It is undisputed that Aaron has the right to receive special education services if he attends a public school. It is also clear that the Westendorps have the constitutional right to choose the education that Aaron shall receive. *See Pierce v. Society of Sisters*, 268 U.S. 510, 534-35, 45 S.Ct. 571, 69 L.Ed. 1070 (1925) (discussing "the liberty of parents and guardians to direct the upbringing and education of children under their control," which "excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only"); *see also Wisconsin v. Yoder*, 406 U.S. 205, 233-34, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). If the Westendorps exercise their right to send Aaron to the school of their choice, however, ISD No. 273 will not provide special education services to Aaron. *See* Kodrich Dep. at 114, reprinted in J.A. at 499. The Westendorps therefore argue that ISD No. 273 has unconstitutionally conditioned their receipt of a generally available right ***1002** upon their forbearance of a constitutional right. *See, e.g., Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 717-18, 101 S.Ct. 1425, 67 L.Ed.2d 624

(1981) ("Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.").

[8] While "the government may not deny a benefit to a person because he exercises a constitutional right," *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 545, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983), the government's "decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny." *Id.* at 549, 103 S.Ct. 1997. Indeed, the Supreme Court has been extremely hesitant to suggest that private school students have a constitutional entitlement to the same benefits that are given to public school students by the government. *See, e.g., Norwood v. Harrison*, 413 U.S. 455, 462, 93 S.Ct. 2804, 37 L.Ed.2d 723 (1973) ("In *Pierce*, the Court affirmed the right of private schools to exist and to operate; it said nothing of any supposed right of private or parochial schools to share with public schools in state largesse, on an equal basis or otherwise. It has never been held that if private schools are not given some share of public funds allocated for education that such schools are isolated into a

classification violative of the Equal Protection Clause. It is one thing to say that a State may not prohibit the maintenance of private schools and quite another to say that such schools must, as a matter of equal protection, receive state aid.").

In light of our remand on other bases, however, we need not reach this issue. *See Clinton v. Jones*, 520 U.S. 681, 117 S.Ct. 1636, 1642 n.11, 137 L.Ed.2d 945 (1997) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality unless such adjudication is unavoidable." (quotations and alteration omitted)). Accordingly, we leave this matter for another day.

V.

We reverse the district court's grant of summary judgment to ISD No. 273, and we remand for a factual determination of whether ISD No. 273's denial of services to Aaron Westendorp at Calvin Christian School was motivated by religious animus. In addition, we remand this matter to the district court for a determination of the proper relief to the plaintiffs for the defendant's past violation of IDEA.

ROSS, Circuit Judge, dissenting.

I disagree with the majority that the district court erred in granting summary judgment in favor of ISD No. 273, and thus dissent.

As to the Westendorps' religious discrimination claim, the majority believes that the evidence "strongly suggests" that the school district's "long-standing policy, which it maintains today, of not providing direct, on-site special education and related services at private schools, regardless of their religious or secular orientation" is a "mere pretext for religious discrimination." Maj. Op. at 997. To me, the fact that the school district has provided special education services at a nonreligious private preschool and to a home-schooled student does not raise an inference that it has discriminated on the basis of religion in refusing to provide on-site services in the K-12 classroom setting, which is the issue in this case. Moreover, in concluding there is a disputed issue of fact as to pretext, the majority has improperly engaged in fact finding and ignored the parties' stipulation that "the material facts of this case are not in dispute." Indeed, in the course of its opinion, the majority transforms a finding of a disputed fact into a finding of undisputed fact. On page 16, the majority states that ISD No. 273 "simply denied [Aaron] services at Calvin Christian School because it is a private religious school" and "would have denied services to any disabled student at a private religious school." While it is undisputed that

the school district denies on-site services to students at private *1003 schools, it is not undisputed that services are denied because of the religious nature of the school.

In addition, the majority's characterization of the school district's policy as "a mere ad hoc rationalization of an irrational policy" ignores the evidence. Maj. Op. at 997. Penny Kodrich, the school district's director of special services, stated that the policy was long-standing and was designed to maintain control over the quality of the district's programs and personnel, foster integrated teamwork and communication between special education and regular staff, and maximize benefits to students based on limited financial resources. Kodrich further stated that if the school district had to provide on-site services at private schools these goals would be frustrated. For example, regarding quality concerns, Kodrich explained that the special services staff work as part of an integrated team with the general education staff and if services were provided at private schools, the school district would have no control over the selection, training, and coordination of private staff members.

Regarding cost considerations, Kodrich explained that the school district "constantly endeavors to provide the maximum educational benefit to a large population of disabled students based on a very limited set of resources." J.A. at 152. She further explained

that "[b]y pooling direct special education resources in public school sites the School District can realize economic efficiencies by sharing and integrating resources." *Id.* In particular, she noted that the services of a paraprofessional "can and are frequently shared by more than one student" and that "[i]f the school district was required to send individual paraprofessionals out to remote sites, the savings realized by these efficiencies would be lost." *Id.* In addition, Wayne Erickson, manager of the state division of special education, stated that, based on his financial analysis, provision of on-site services to disabled private school students would result in additional expenditures of at least $10,814,027.00 for school districts and $5,882,830.00 for the state. *Id.* at 144. He also stated that it was impossible to estimate additional costs if school districts provided on- site services at private schools since special education students enrolled in public schools might then choose private schools. *Id.* at 145. Thus, the majority incorrectly states that "there is no evidence that ISD No. 273 denied services at Calvin Christian School because economies of scale, or geographical considerations, [made] it economically infeasible to provide certain services at private school locations." Maj. Op. at 1001 (internal quotation omitted).

Moreover, and importantly, the majority ignores the Supreme Court's admonition that "courts are not to 'substitute their own notion of sound educational policy

for those of the school authorities which they review.'" *Fort Zumwalt Sch. Dist. v. Clynes*, 119 F.3d 607, 610 (8th Cir. 1997) (quoting *Board of Educ. v. Rowley*, 458 U.S. 176, 206, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982), *cert. denied*, ___ U.S. ___, 118 S.Ct. 1840, 140 L.Ed.2d 1090 (1998)). This is so because "[c]ourts 'lack the specialized knowledge and experience necessary to resolve persistent and difficult questions of educational policy[.]'" *Id.* at 613 (quoting Rowley, 458 U.S. at 208, 102 S.Ct. 3034). Especially difficult questions facing school districts concern "implement[ing] the policy of educating all disabled students" in light of limited financial resources, and "the sufficiency of that education must be evaluated in light of the available resources." *Id.* at 612.

I also disagree with the majority's holding that ISD No. 273's conduct violated the IDEA before it was amended in 1997. The pre-amended statute provided that disabled students who were placed in private schools by the state or school district were entitled to "special education and related services ... at no cost to their parents or guardian." 20 U.S.C. §1413(a)(4)(B)(i) (1994). In contrast, disabled students who were unilaterally placed in private schools by their parents were only entitled to participate in special education programs and services "to the extent consistent with the number and location of" disabled students within the state. Id. at §1413(a)(4)(A) (1994).

In 1997 Congress amended the statute to make clear that the IDEA "does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at *1004 a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility." 20 U.S.C.A. §1412(a)(10)(C)(i) (West Supp. 1998). As the majority concedes, "Aaron has no right under the 1997 Amendments to receive ISD No. 273-funded services at Calvin Christian School." Maj. Op. at 998 (citing *Foley v. Special Sch. Dist. of St. Louis County*, 153 F.3d 863, 865 (8th Cir. 1998) ("1997 Amendments expressly provide that public school agencies are not required to pay the cost of special education services for a particular child")).

In enacting the 1997 Amendments, Congress merely "clarif[ied] the responsibility of public school districts to children with disabilities who are placed by their parents in private schools." S.Rep. No. 17, 105th Cong. 1st. Sess. 13 (1997). Thus, I believe the amended IDEA applies to all of the Westendorps' IDEA claims and precludes relief. *See K.R. ex rel. M.R. v. Anderson Community Sch. Corp.*, 81 F.3d 673 (7th Cir. 1996), *vacated and remanded for reconsideration in light of 1997 Amendments to IDEA*, ___ U.S. ___, 117 S.Ct. 2502, 138 L.Ed.2d 1007, *and on remand*, 125 F.3d 1017, 1019 (7th Cir. 1997) (1997

Amendments were "legislative clarification"), *cert. denied*, ___ U.S. ___, 118 S.Ct. 1360, 140 L.Ed.2d 510 (1998); *Donald B. v. Board of Sch. Comm'r*, 117 F.3d 1371, 1373 n. 2 (11th Cir. 1997) (1997 Amendments "do not alter substantively" §1413(a)(4)); *Cefalu ex rel. Cefalu v. East Baton Rouge Parish Sch. Bd.*, 117 F.3d 231, 232 (5th Cir. 1997) (same).

Even if the 1997 Amendments are not controlling, I do not believe that the pre-amended IDEA required that a school district provide on-site services to a disabled student who was unilaterally placed at a private school. "The goal of IDEA is to provide access to public education for all handicapped students." *Fort Zumwalt Sch. Dist.*, 119 F.3d at 612. "IDEA does not require that a school either maximize a student's potential or provide the best possible education at public expense." *Id.* "The statute only requires that a public school provide sufficient specialized services so that the student benefits from his education." *Id.* Moreover, this court has held that the preamended IDEA and "regulations promulgated thereunder g[a]ve the school district discretion in selecting the location where it w[ould] educate a handicapped child." *Schuldt v. Mankato Ind. Sch. Dist. No. 77*, 937 F.2d 1357, 1361 (8th Cir. 1991), *cert. denied*, 502 U.S. 1059, 112 S.Ct. 937, 117 L.Ed.2d 108 (1992). It is undisputed that ISD No. 273 provides Aaron a paraprofessional at a public school, and his parents have not questioned the quality of the services that Aaron receives.

The majority is persuaded by the Tenth Circuit's analysis in *Fowler v. Unified Sch. Dist. No. 259*, 107 F.3d 797, *vacated and remanded for reconsideration in light of 1997 Amendments to IDEA*, ___ U.S. ___, 117 S.Ct. 2503, 138 L.Ed.2d 1008, *and on remand*, 128 F.3d 1431 (10th Cir. 1997). In *Fowler*, the Tenth Circuit "recognized that the IDEA and its regulations afford considerable discretion to [school districts] to determine the manner and extent of services to be provided" to disabled students in private schools. 107 F.3d at 806. Although the court did not believe that the school district was obligated to provide on-site services of a full-time interpreter at a private school, *id.*, it held that a school district had to "pay for that service an amount up to, but not more than, the average cost to the District to provide that same service to hearing-impaired students in the public school setting." *Id.* at 807-08. However, the court acknowledged that its holding appeared to conflict with IDEA regulations, *id.* at 808 n.12, the interpretation of the Department of Education (DOE), *id.* at 804-05, and the Seventh Circuit's decision in *Anderson*, *id.* at 806.

Unlike the majority and the Tenth Circuit, I agree with the Seventh Circuit that "[w]here the public school makes available the necessary service at a public institution, giving the disabled student a genuine opportunity to participate, and nothing in the record indicates that it has otherwise abused its discretion, the public school has discharged its obligation" under the

pre-amended IDEA. *Anderson*, 81 F.3d at 680; *see also Goodall v. Stafford County Sch. Bd.*, 930 F.2d 363, 369 (4th Cir.) (school district fulfilled its statutory obligation by offering disabled student services of speech interpreter at public ***1005** school), *cert. denied*, 502 U.S. 864, 112 S.Ct. 188, 116 L.Ed.2d 149 (1991).

In this case, the majority relies on 34 C.F.R. §76.654(a) (1996), which required that the benefits a school district provided for private school students be "comparable in quality, scope, and opportunity for participation to" the benefits provided for public school students. However, as explained in Anderson, the regulation was "not by its terms a mandate that private school students shall receive full benefits." 81 F.3d at 679. Rather, "read in light of the statutory scheme ... and the other regulations, ... the only reasonable interpretation of Section 76.654(a) is that the comparability requirement [wa]s limited to the program benefits that [a district] provide[d]." Anderson, 81 F.3d at 679 (internal quotation omitted). In other words, because public school districts had "discretion over what benefits to provide[,]" the regulation only required that "when benefits [we]re provided ... that they [would] be comparable to benefits for public school students." *Id.*

Thus, the majority's "determination that a full-time instructional assistant was the only 'comparable'

alternative ... fail[s] to take into account the discretion afforded public schools in deciding which services to provide." *Id.* Moreover, and, "not insignificantly," the majority's determination conflicts with the DOE's interpretation of the regulations. *Id.* at 678. As the majority notes, the DOE's position was that the "regulations d[id] not confer on every parentally-placed child with a disability an individual entitlement to services." Maj. Op. at 1000 n. 2 (internal quotation omitted). Because the DOE's interpretation was not plainly erroneous or inconsistent with the regulations, "it must be given controlling weight." *Board of Regents v. Shalala*, 53 F.3d 940, 943 (8th Cir. 1995).

In sum, I believe that in providing the services of a paraprofessional to Aaron "at a public site and declining to provide an instructional assistant to a single student in the private school, it is evident that [ISD No. 273] fairly exercised its discretion to consider the number of eligible private school students and their needs in deciding what benefits w[ould] be provided." *Anderson*, 81 F.3d at 680. Because "there is no evidence here that [ISD No. 273] eschewed its responsibility under the IDEA," *id.*, and because I believe that the district court properly rejected the Westendorps' other claims, I would affirm the grant of summary judgment in favor of ISD No. 273. I thus dissent.

958 F.Supp. 1383
117 Ed. Law Rep. 943, 23 A.D.D. 435
(Cite as: 958 F.Supp. 1383)

Joan **PETER**; Sarah Peter, a minor, by and through her parent and natural guardian Joan Peter; Krista Westendorp; Douglas Westendorp; Aaron Westendorp, a minor, by and through his parents and natural guardians Krista Westendorp and Douglas Westendorp; and Choice In Education Foundation, Inc., Plaintiffs,

v.

Bruce H. **JOHNSON**, Commissioner, Minnesota Department of Children, Families and Learning; Arne H. Carlson, Governor, State of Minnesota; Independent School District No. 877 (Buffalo, Minnesota); and Independent School District No. 273 (Edina, Minnesota), Defendants.

Civil No. 4-96-642 (DSD/JMM).
United States District Court,
D. Minnesota,
Fourth Division.
March 26, 1997.

Disabled students and advocacy organization sued state officials and school districts, seeking declaratory, injunctive, and monetary relief for alleged violations of free speech and free exercise clauses of First Amendment, equal protection clause of Fourteenth Amendment, Religious Freedom Restoration Act (RFRA), and Individuals with Disabilities Education

Act (IDEA) occasioned by refusal of state and school districts to provide special educational services to disabled students attending private sectarian schools. On plaintiffs' motions for preliminary injunction and for partial summary judgment, and defendants' motions to dismiss, the District Court, Doty, J., held that: (1) students' allegations of injury-in-fact were sufficient to confer standing; (2) advocacy organization's allegations of injury-in-fact were insufficient to confer standing; (3) students' action was ripe for judicial review; (4) students were not required to exhaust administrative remedies under IDEA prior to bringing suit in federal court; (5) students' allegation that officials and school districts treated nonpublic religious schools differently from nonpublic nonreligious schools with respect to provision of on-site paraprofessional services to disabled students enrolled therein was sufficient to satisfy requirements of §1983; (6) officials and school districts were not required under IDEA and its regulations to provide on-site paraprofessional services to disabled students unilaterally placed in private schools by their parents; and (7) students were not entitled to preliminary injunction requiring officials and school districts to provide them with special educational services in private religious school setting.

Plaintiffs' motions denied; defendants' motions granted in part and denied in part.

[1] FEDERAL CIVIL PROCEDURE k103.2
170Ak103.2
To establish standing within constitutional core requirements, plaintiff must satisfy three elements: that plaintiff suffered injury in fact; that there is causal connection between plaintiff's injuries and challenged action; and that favorable decision in case would likely redress plaintiff's injuries. U.S.C.A. Const. Art. 3, §2, cl. 1.

[1] FEDERAL CIVIL PROCEDURE k103.3
170Ak103.3
To establish standing within constitutional core requirements, plaintiff must satisfy three elements: that plaintiff suffered injury in fact; that there is causal connection between plaintiff's injuries and challenged action; and that favorable decision in case would likely redress plaintiff's injuries. U.S.C.A. Const. Art. 3, §2, cl. 1.

[2] FEDERAL CIVIL PROCEDURE k103.2
170Ak103.2
To satisfy "injury-in-fact" element of constitutional standing test, alleged injury must be invasion of legally protected interest which is: concrete and particularized; and actual or imminent, not conjectural or hypothetical. U.S.C.A. Const. Art. 3, §2, cl. 1. See publication Words and Phrases for other judicial constructions and definitions.

[3] SCHOOLS k155.5(2.1)

345k155.5(2.1)

Allegations of parents of disabled students that they withdrew students from private religious schools as result of alleged school district policies prohibiting districts from offering special education services in private religious school setting were sufficient to satisfy "injury-in-fact" requirement and confer standing on parents to challenge alleged policies at issue. U.S.C.A. Const. Art. 3, §2, cl. 1.

[4] ASSOCIATIONS k20(1)

41k20(1)

For organization to have standing to bring suit on behalf of its members, organization must satisfy three-part test: that its members would otherwise have standing to sue in their own right; that interests organization seeks to protect are germane to organization's purpose; and that neither claim asserted nor relief requested requires participation of individual members in lawsuit. U.S.C.A. Const. Art. 3, §2, cl. 1.

[5] ASSOCIATIONS k20(1)

41k20(1)

"Injury-in-fact" element of standing test with respect to organization seeking to bring suit on behalf of its members requires more than cognizable interest; rather, organization must sufficiently allege that its members are directly affected by defendants' actions. U.S.C.A. Const. Art. 3, §2, cl. 1. See publication

Words and Phrases for other judicial constructions and definitions.

[6] ASSOCIATIONS k20(1)

41k20(1)

Allegations of injury made by advocacy organization in its suit against state officials and school district, which suit arose out of alleged state and school district policies prohibit districts from offering special educational services to disabled students in private religious schools, were insufficient to satisfy "injury-in-fact" element of standing test; organization did not allege that its members sought special education assistance for their children within statutory and regulatory framework at issue or were denied such assistance, that its individual members resided within defendant school districts, or that any injury other than conjectural and hypothetical injury that might arise from denial of statutory entitlement to individual students was sustained by religious organizations and schools belonging to it. U.S.C.A. Const. Art. 3, §2, cl. 1. See publication Words and Phrases for other judicial constructions and definitions.

[7] ADMINISTRATIVE LAW AND PROCEDURE k704

15Ak704

Basic purpose of ripeness doctrine is to prevent courts from entangling themselves in abstract disagreements over administrative policies, and also to protect

agencies from judicial interference until administrative decision has been formalized and its effects felt in concrete way by challenging parties; question of ripeness tests fitness of issues for judicial decision and hardship to parties of withholding consideration.

[8] FEDERAL COURTS k13.30

170Bk13.30

Challenge to state statutes and policies with respect to provision of special education services to disabled students in private religious school setting, brought by parents of disabled students under Individuals with Disabilities Education Act (IDEA), was ripe for judicial review; complaint alleged real and imminent injury due to effects of regulation and its implementation upon students' access to publicly funded on-site paraprofessional services at private religious schools, rather than raising merely abstract or speculative issues. Individuals with Disabilities Education Act, §613(d), as amended, 20 U.S.C.A. §1413(d); Minn.R. 3525.1150.

[9] ADMINISTRATIVE LAW AND PROCEDURE k229

15Ak229

Doctrine of exhaustion of administrative remedies embraces principles that agencies, not courts, ought to have primary responsibility for programs that Congress has charged them to administer, and that agency ought to have opportunity to correct its own mistakes with

respect to programs it administers before it is haled into federal court.

[10] SCHOOLS k155.5(3)
345k155.5(3)
Disabled students suing state officials and school districts in attempt to compel on-site provision of paraprofessional assistance at private religious schools were not required to exhaust administrative remedies under Individuals with Disabilities Education Act (IDEA) prior to bringing suit in federal court; provision of services sought by students was allegedly prohibited by state regulation, action challenged state regulation and school district policies as being unconstitutional and in violation of federal statute, and neither hearing officer nor state commissioner of education had authority to alter state rule to include private religious school as permissible location for special education services. Individuals with Disabilities Education Act, §601 et seq., as amended, 20 U.S.C.A. §1400 et seq.; M.S.A. §§120.17, subd. 3, 121.02, subd. 1, 121.16; Minn.R. 3525.1150.

[11] SCHOOLS k155.5(4)
345k155.5(4)
Plaintiffs seeking to bring action under Individuals with Disabilities Education Act (IDEA) have burden of demonstrating that their circumstances warrant excusal from administrative procedures set forth therein.

Individuals with Disabilities Education Act, §601 et seq., as amended, 20 U.S.C.A. §1400 et seq.

[12] SCHOOLS k155.5(3)
345k155.5(3)
For purpose of determining whether plaintiff under Individuals with Disabilities Education Act (IDEA) is required to exhaust administrative procedures set forth therein prior to bringing suit in federal court, pursuit of administrative procedures would be "futile" if agency in question either was acting in violation of law or was unable to remedy alleged injury. Individuals with Disabilities Education Act, §601 et seq., as amended, 20 U.S.C.A. §1400 et seq. See publication Words and Phrases for other judicial constructions and definitions.

[13] FEDERAL COURTS k265
170Bk265
As general rule, Eleventh Amendment bars suits brought in federal court against states and their agencies in absence of consent by state or express abrogation by Congress within its authority. U.S.C.A. Const.Amend. 11.

[14] FEDERAL COURTS k265
170Bk265
Congress did not abrogate Eleventh Amendment immunity in enacting §1983. U.S.C.A. Const.Amend. 11; 42 U.S.C.A. §1983.

[15] FEDERAL COURTS k272
170Bk272
Notwithstanding lack of state consent or congressional abrogation, civil actions in federal court which seek injunctive relief against state officials are not always barred by Eleventh Amendment; suits may be brought in federal court against state officials in their official capacities for prospective injunctive relief to prevent future violations of federal law. U.S.C.A. Const.Amend. 11.

[16] CIVIL RIGHTS k206(1)
78k206(1)
State officials sued pursuant to Ex parte Young doctrine are "persons" susceptible to suit under §1983, as such actions are not treated as actions against state. 42 U.S.C.A. §1983. See publication Words and Phrases for other judicial constructions and definitions.

[17] FEDERAL COURTS k272
170Bk272
Suit against state officials pursuant to Ex parte Young doctrine, denominated by plaintiffs as being against officials in both their individual and official capacities, would be treated by district court as suit against officials in their official capacities only, as plaintiffs sought declaratory and injunctive relief from allegedly unconstitutional actions taken under color of state law.

[18] FEDERAL COURTS k265
170Bk265
Court conducts two-fold inquiry to determine whether Congress has abrogated states' Eleventh Amendment immunity from suit: first, court must determine whether Congress has unequivocally expressed its intent; and second, court must determine whether Congress has acted pursuant to valid exercise of power. U.S.C.A. Const.Amend. 11.

[19] FEDERAL COURTS k265
170Bk265
States' Eleventh Amendment immunity from suit with respect to violations of Individuals with Disabilities Education Act (IDEA) was abrogated by Congress; intent to abrogate was unequivocally expressed in statute, and Congress enacted IDEA pursuant to valid exercise of its powers under Fourteenth Amendment. U.S.C.A. Const.Amend. 14, §5; Individuals with Disabilities Education Act, §604, as amended, 20 U.S.C.A. §1403.

[20] CIVIL RIGHTS k235(2)
78k235(2)
Allegation by disabled students that state officials and school districts treated nonpublic religious schools differently from nonpublic nonreligious schools with respect to provision of on-site paraprofessional services to disabled students enrolled therein was sufficient to satisfy requirement of §1983 that plaintiff allege

violation of right, privilege or immunity protected by Constitution or laws of United States. U.S.C.A. Const.Amends. 1, 14; 42 U.S.C.A. §1983.

[21] FEDERAL CIVIL PROCEDURE k2534
170Ak2534
District Court would consider motions of state officials and school districts to dismiss claims brought by disabled students under Individuals with Disabilities Education Act (IDEA) as cross motions for partial summary judgment, where students moved for partial summary judgment with respect to those claims and court therefore considered materials outside of pleadings with respect thereto. Individuals with Disabilities Education Act, §601 et seq., as amended, 20 U.S.C.A. §1400 et seq.; Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[22] SCHOOLS k154(4)
345k154(4)
State officials and school districts were not required, under Individuals with Disabilities Education Act (IDEA) and regulations thereunder, to provide on- site paraprofessional services to disabled students unilaterally placed in private schools by their parents; IDEA and regulations differentiated among students with disabilities depending upon whether student attended public or private school, and if private school, upon whether student was publicly or unilaterally placed therein, discretion was generally afforded state

and local school districts as to educational policy decisions involving allocation of scarce resources, and Congress intended to give disabled students voluntarily attending private school lesser entitlement under IDEA. Individuals with Disabilities Education Act, §613(a)(4), as amended, 20 U.S.C.A. §1413(a)(4); 34 C.F.R. §§76.651-76.662.

[23] SCHOOLS k154(4)

345k154(4)

Requirement under Individuals with Disabilities Education Act (IDEA) and regulations thereunder that programs provided to private school students must be comparable in quality, scope, and opportunity to those offered to public school students is confined, in its application to students unilaterally placed in private school by their parents, to those program benefits which responsible agency elects to provide to unilaterally placed students. Individuals with Disabilities Education Act, §613(a)(4), as amended, 20 U.S.C.A. §1413(a)(4); 34 C.F.R. §§76.651-76.662.

[24] INJUNCTION k138.1

212k138.1

Court considers and balances four factors in determining whether to grant plaintiffs' motion for preliminary injunction: whether there is substantial threat that plaintiffs will suffer irreparable harm if relief is not granted; whether irreparable harm to plaintiffs outweighs any potential harm that granting

preliminary injunction may cause defendants; whether there is substantial probability that plaintiffs will prevail on merits; and public interest.

[25] INJUNCTION k147
212k147
Plaintiff seeking preliminary injunction bears burden of proof concerning factors considered by court, and this burden is greater if movant is not seeking to maintain status quo, but rather to obtain same relief he would receive after trial on merits.

[26] SCHOOLS k155.5(5)
345k155.5(5)
Disabled students were not entitled to preliminary injunction suspending enforcement of state regulations and school district policies in manner requiring state and districts to provide them with special educational services in private religious school setting; court would not be inclined to grant relief in form sought even assuming that students prevailed on merits of their underlying free speech, free exercise, equal protection and statutory claims, students were receiving paraprofessional services sought by them in public school setting, and balancing of harms weighed against grant of injunctive relief. U.S.C.A. Const.Amends. 1, 14; Religious Freedom Restoration Act of 1993, §2 et seq., 42 U.S.C.A. §2000bb et seq.; Minn.R. 3525.1150, subp. 2.

[27] INJUNCTION k138.6

212k138.6

Showing of possible or speculative harm resulting from denial of preliminary injunction is insufficient to satisfy requirement that plaintiff seeking preliminary injunction show substantial threat of irreparable harm absent injunction.

[28] INJUNCTION k138.6

212k138.6

Absence of showing of substantial threat that plaintiffs will suffer irreparable harm if relief is not granted, alone, is sufficient to justify denial of preliminary injunction.

*1387 Daniel L. Bowles, C. Eric Hawes, Larkin, Hoffman, Daly & Lindgren, Bloomington, MN, for Joan Peter.

Daniel L. Bowles, C. Eric Hawes, Larkin, Hoffman, Daly & Lindgren, Bloomington, MN and Michael S. Paulsen, University of Minnesota Law Center, Minneapolis, MN, for Sarah Peter, Krista Westendorp, Douglas Westendorp, Aaron Westendorp, Choice in Educ. Foundation, Inc.

Lynn A. Zentner, U.S. Attorney Office, Minneapolis, MN, Janis C. Kestenbaum, Theodore C. Hirt, U.S. Dept. of Justice, Washington, D.C., for U.S.

Steven Liss, Rachel Kaplan, Minn. Atty. Gen., St. Paul, MN, for Bruce H. Johnson and Arne H. Carlson.

Paul C. Ratwik, Nancy E. Blumstein, Ratwik, Roszak, Bergstrom & Maloney, Minneapolis, MN, for Independent School Dist. No. 877, Buffalo, MN, Independent School Dist. No. 273, Edina, MN.

ORDER

DOTY, District Judge.

This matter is before the court on plaintiffs' motion for preliminary injunction, plaintiffs' motion for partial summary judgment, and defendants' motions to dismiss. Based on a review of the file, record and proceedings herein, and for the reasons stated, the court denies plaintiffs' motion for preliminary injunction and motion for partial summary judgment; and grants in part, and denies in part defendants' motions to dismiss.

BACKGROUND

Plaintiff Sarah Peter is a child with Down's Syndrome disabilities. She resides with her mother, Joan Peter, in Buffalo, Minnesota, within the geographical boundaries of Independent School District No. 877. Plaintiff Aaron Westendorp is a child with disabilities resulting from a brain stem lesion. He resides with his parents Douglas Westendorp and Krista Westendorp in Edina, Minnesota, within the geographical boundaries of Independent School District No. 273. Plaintiff Choice In Education Foundation, Inc., is a Minnesota nonprofit corporation with

members including parents of children with special education needs, religious schools, and religious organizations.

During the summer of 1995, Joan Peter enrolled her daughter, Sarah, in the Noah's Ark Preschool for the 1995-96 academic year. Plaintiffs describe Noah's Ark Preschool as a Christian preschool operated on the premises of St. John's Lutheran Church which consists of a preschool program religious in nature. Plaintiffs assert that Sarah was determined to be a child with a disability entitled to special education services. The officials of Independent School District No. 877 formulated an Individual Education Plan ("IEP") and determined that Sarah would benefit from the services of a paraprofessional aide. Plaintiffs allege that during the summer of 1995, officials of Independent School District No. 877 informed Sarah's mother that the school district could not provide a paraprofessional aide for her daughter if Sarah attended Noah's Ark preschool, because state regulations prohibited them from *1388 providing such services on the premises of a religious school. Plaintiffs' Complaint ¶26. Because she was allegedly without the financial means to provide a paraprofessional aide for her daughter, Joan Peter enrolled Sarah in a public pre-school program for the 1995-96 academic year.

Plaintiff Aaron Westendorp attended Calvin Christian School from September 1991 until June

1994. Officials of the Independent School District No. 273 determined that Aaron was in need of special education services, including the assistance of a full-time paraprofessional. With the financial assistance of the church, the Westendorp family was able to provide for paraprofessional services for Aaron on-site at his religious school. When the Westendorp family changed churches, the Westendorp family was unable to obtain the financial support necessary for the services, and withdrew Aaron from the private school.

Plaintiff Choice in Education Foundation, Inc., ("the Foundation"), asserts that several of its parent-members have children with handicaps or other special needs making them eligible for special education assistance and, as a consequence of Minnesota's state regulations and interpretations of those regulations, the families have incurred expenses that they would not have incurred if their children were enrolled in nonreligious private schools. In addition, the Foundation asserts that its members include organizations of religious schools which have allegedly been discriminated against because of their programs' religious nature, content, and viewpoint.

Plaintiffs challenge Minnesota's regulations and policies which implement the state's policies and plan under the Individuals with Disabilities in Education Act ("IDEA"), 20 U.S.C. §1400 *et seq*. The IDEA states that children with disabilities are to be provided

a "free appropriate public education." *See* 20 U.S.C. §1400(c). The IDEA provides procedural and substantive requirements for participating State and local education agencies to follow to ensure that disabled children receive such education. The IDEA is implemented in Minnesota under the state statutes and regulations. *See* Minn.Stat. §120.17 (1994); Minn. Rules Chapter 3525. Under Minnesota law, every school district is to provide special instruction and services for children with a disability who are residents of the district. *See* Minn.Stat. §120.17, subd. 1. Minnesota Rule 3525.1150, subpart 1, provides that school districts are "to identify and make available special education to all students who are disabled regardless of whether they attend a nonpublic school." Minnesota State Rule 3525.1150, subpart 2, provides that special education services provided directly or indirectly to the student "must be provided at a neutral site that is consistent with Minnesota Statutes, section 123.932, subdivision 9." A "neutral site" is defined as "a public center, a nonsectarian nonpublic center, a mobile unit located off the nonpublic school premises, or any other location off the nonpublic school premises which is neither physically nor educationally identified with the functions of the nonpublic school." *See* Minn.Stat. §123.932, subd. 9. A "nonpublic school" is defined as "any school, church or religious organization, or home school" wherein a resident may legally fulfill the compulsory instruction requirements. Minn.Stat. §123.932, subd. 3. A "nonsectarian

nonpublic school" is defined as any nonpublic school which is not "church related, is not controlled by a church, and does not promote a religious belief." Minn.Stat. §123.932, subd. 3a. A nopublic sectarian school is not included in the definition of a "neutral site." Plaintiffs argue that Minnesota Rule 3525.1150, on its face and in effect, denies on-site special education services to otherwise eligible students attending private religious schools, but authorizes such services for eligible students attending private nonreligious schools when such services are deemed an appropriate part of a child's individual education plan. *See* Plaintiffs' Complaint ¶16.

In their complaint, Plaintiffs seek declaratory, injunctive, and monetary relief. Plaintiffs allege that the State's regulations and school district's policies violate the Free Speech and Free Exercise clauses of the First Amendment to the U.S. Constitution, the Equal Protection Clause of the Fourteenth Amendment, the Religious Freedom *1389 Restoration Act ("RFRA"), 42 U.S.C. §2000bb *et seq.*, and the Individuals with Disabilities in Education Act ("IDEA"), 20 U.S.C. §1400 *et seq.*

Plaintiffs assert their claims against defendant Bruce H. Johnson, both in his individual capacity and in his official capacity as Commissioner of the Department of Children, Families, and Learning for the State of Minnesota, and defendant Arne H.

Carlson, both in his individual capacity and in his official capacity as governor of the State of Minnesota (collectively referred to as "the State defendants"). Plaintiffs allege that the State officials are responsible for the interpretation, implementation, and enforcement of the challenged Minnesota Rule 3525.1150. Plaintiffs also assert their claims against Independent School District No. 877, and Independent School District No. 273 ("the school districts"). Plaintiffs claim that the school districts are responsible for the implementation of Minnesota State Rule 3525.1150, as interpreted and enforced by the State defendants. *See* Plaintiffs' Complaint ¶17.

The school districts move to dismiss plaintiffs' claims on four grounds; specifically, that the plaintiffs lack standing, that the plaintiffs' claims are not yet ripe for judicial review, that the plaintiffs failed to exhaust administrative remedies, and that the plaintiffs failed to state a claim for which the law provides a remedy. Likewise, the State defendants move to dismiss plaintiffs claims, alleging that plaintiffs have failed to state a claim under the Constitution or federal statutes, that plaintiffs failed to exhaust their administrative remedies under the IDEA, that plaintiffs' constitutional claims are not ripe for judicial review, that the State defendants are not "persons" under §1983 and, in any event, are entitled to qualified immunity for damages under 42 U.S.C. §1983, and that the Foundation lacks standing.

The plaintiffs oppose the motions to dismiss and move for a preliminary injunction to restrain defendants from enforcing the challenged regulations during the pendency of the proceedings and from "denying special education services, including on-premises services, to otherwise eligible handicapped children, on the basis of the religious nature, content, or viewpoint, of the school attended by the child." Plaintiffs' Memorandum of Law in Support of Preliminary Injunction at 2. Plaintiffs also move for partial summary judgment on the IDEA claim.

DISCUSSION

A. Defendants' Motions to Dismiss

1. Standard of Review

A motion to dismiss for failure to state a claim tests the sufficiency of the complaint. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974). When analyzing a motion to dismiss, the court looks to the complaint as pleaded. The complaint must be liberally construed and viewed in the light most favorable to the plaintiff. In construing the sufficiency of the complaint, the court may consider materials attached to the complaint as exhibits. *See County of St. Charles, Missouri v. Missouri Family Health Council*, 107 F.3d 682 (8th Cir. 1997) (recognizing that only the pleadings and materials attached to the complaint are considered on a motion to

dismiss); *Hilton v. Pine Bluff Pub. Schools*, 796 F.2d 230, 231-32 (8th Cir. 1986) (stating that materials attached to the complaint as exhibits may be considered in construing the sufficiency of the complaint); *Morton v. Becker*, 793 F.2d 185, 187 (8th Cir. 1986). The court will dismiss a complaint only when it appears the plaintiff cannot prove any set of facts that support the claim. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957).

Pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, when matters outside of the pleadings are presented to the court and not excluded, a party's motion to dismiss for failure to state a claim upon which relief can be granted must be treated as a motion for summary judgment. *See Woods v. Dugan*, 660 F.2d 379, 380 (8th Cir. 1981). The rule further provides that if the motion is treated as one for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, all parties must be given reasonable opportunity to present material pertinent to the motion. *See* Fed.R.Civ.P. 12(b). In this instance, plaintiffs ***1390** urge that the defendants have relied on affidavits outside of the pleadings in bringing their motions to dismiss. *See Gibb v. Scott*, 958 F.2d 814, 816 (8th Cir. 1992) (discussing matters viewed as "outside the pleading"). Plaintiffs argue that the motions should be construed as motions to dismiss and that the affidavits should be excluded. However, the plaintiffs submitted affidavits in the event that the court considers matters

outside of the pleadings. In doing so, the plaintiffs urge that they have been unable to produce more extensive affidavits due to a court order staying discovery. *See* Fed.R.Civ.P. 56(f). Rather than considering matters outside of the pleadings and converting defendants' motions to dismiss to motions for summary judgment, the court excludes and has not considered materials outside of the complaint and its attached exhibits.

2. Standing

[1] This court's jurisdiction is limited by Article III of the U.S. Constitution, which limits the judicial power of the federal courts to "cases" and "controversies." U.S. Const., art. III, §2, cl. 1. A threshold question in every case is whether the plaintiff has standing to invoke the jurisdiction of the federal courts. The standing doctrine is "an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 561, 112 S.Ct. 2130, 2136, 2137, 119 L.Ed.2d 351 (1992); *Mausolf v. Babbitt*, 85 F.3d 1295, 1301 (8th Cir. 1996) (recognizing that standing requirement is indispensable part of case). To establish standing within the constitutional core requirements of Article III, a plaintiff must satisfy three elements: (1) that plaintiff suffered an injury in fact; (2) that there is a causal connection between plaintiff's injuries and the challenged action; and (3) that a favorable decision in the case would likely redress plaintiff's injuries. *Lujan*, 504 U.S. at 560, 112 S.Ct. at 2136; *Warth v. Seldin*,

422 U.S. 490, 508, 95 S.Ct. 2197, 2210, 45 L.Ed.2d 343 (1975) (placing burden of establishing standing on the party seeking federal jurisdiction). The defendants challenge plaintiffs' standing in the context of motions to dismiss. In *Lujan*, the Supreme Court reiterated the magnitude of a plaintiff's burden depending upon the stage in the proceedings: The party invoking federal jurisdiction bears the burden of establishing [the standing elements]. Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation. At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presum[e] that general allegationsembrace those specific facts that are necessary to support the claim. In response to a summary judgment motion, however, the plaintiff can no longer rest on such "mere allegations," but must "set forth" by affidavit or other evidence "specific facts," Fed. R. Civ. Proc. 56(e), which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts (if controverted) must be supported adequately by the evidence adduced at trial. *Lujan*, 504 U.S. at 561, 112 S.Ct. at 2137 (internal case citations and quotations omitted).

a. The Peters and Westendorps

[2] The school districts argue that the Peters and Westendorps lack standing because they have failed to satisfy the "injury-in-fact" element. The alleged injury must be "an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560, 112 S.Ct. at 2136 (internal citations and quotations omitted). The school districts assert that the students have not suffered an actual or imminent injury as a result of any school district policy because the students are not currently enrolled in private schools. In addition, the school districts assert that while the students and their parents are concerned about access to private religious education, such concern is not sufficient for the injury requirement.

*1391 [3] As alleged in the complaint, both Sarah Peter and Aaron Westendorp were enrolled in private religious schools. Aaron Westendorp attended a private religious school for three years. By a fair reading of the allegations in the complaint and the attached exhibits, the parents withdrew their children from the private religious schools as a result of the school districts' alleged policies which they challenge in the complaint. The court concludes that the fact the children are not currently enrolled in private religious school does not make their injuries hypothetical or conjectural. Plaintiffs have alleged, to the satisfaction of the court, that there was injury. In addition,

although the school districts do not challenge the other standing elements, the court concludes that the Peters and Westendorps have sufficiently alleged standing.

b. Choice in Education Foundation, Inc.

[4] The State defendants and school districts argue that the Foundation has failed to satisfy the standing requirement. The Foundation argues that, as an organization, it has standing to assert the rights and interests of its members. For an organization to have standing to bring suit on behalf of its members, the organization must satisfy a three-part test: (1) that its members would otherwise have standing to sue in their own right; (2) that the interests the organization seeks to protect are germane to the organization's purpose; and (3) that neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *See Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977).

[5] The defendants argue that the Foundation's members do not otherwise have standing to bring suit against the defendants; therefore, the Foundation does not have standing to bring claims as an organization on behalf of its members. The defendants specifically charge that the allegations in the complaint are insufficient as to the injury-in-fact element. The injury-in-fact test requires more than a cognizable

interest; rather, the organization must sufficiently allege that its members are directly affected by the defendants' regulation and policies. *See Sierra Club. North Star Chapter v. Browner*, 843 F.Supp. 1304, 1309 (D.Minn. 1993) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)).

[6] The court has reviewed the complaint and observes that the Foundation has made no allegations that its parent-members sought special education assistance for their children within the statutory and regulatory framework at issue in this case, or that the parent-members and their children were denied such assistance because of the challenged regulation or policies. Moreover, the Foundation has failed to allege that its members even reside within the geographical boundaries served by Independent School District Nos. 273 and 877. Similarly, the Foundation has failed to allege a direct injury sustained by the religious organizations and schools which are members of the Foundation. Whereas the legislative entitlement to a "free appropriate public education" flows to the students and not to the private school, the possibility that a private religious school would sustain an injury as a result of a regulation or policy implementing the statutory entitlement for the individual is conjectural and hypothetical. Because the Foundation has failed to sufficiently allege that its members would otherwise have standing in their own right to bring an action

against the defendants, the court concludes that the Foundation lacks standing and is dismissed as a party in this action.

3. Ripeness

[7] Defendants argue that plaintiffs' IDEA claim is not ripe for judicial review. The ripeness doctrine's basic purpose "'is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Com'n*, 461 U.S. 190, 201, 103 S.Ct. 1713, 1720, 75 L.Ed.2d 752 (1983) (quoting ***1392** *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681 (1967)). The question of ripeness tests "the fitness of the issues for judicial decision and the hardship to the parties of withholding consideration." *Abbott Laboratories*, 387 U.S. at 149, 87 S.Ct. at 1515.

[8] The State defendants argue that plaintiffs' claims will not be ripe for review until the federal government directly denies plaintiffs the funding for special education services. *See* 20 U.S.C. §1413(d). Similarly, the school districts argue that plaintiffs have failed to allege a real or imminent injury. The court is

not persuaded by defendants' arguments. The plaintiffs have alleged the effects that the regulation and its implementation have had on their access to publicly funded on-site paraprofessional services at private religious schools such that the issues are not merely abstract or speculative. The court concludes that plaintiffs' challenge to Minnesota Rule 3525.1150 and related policies are ripe for judicial review.

4. Exhaustion of Administrative Remedies

[9] Defendants argue that the plaintiffs are barred from bringing this suit because they have failed to exhaust administrative remedies. The IDEA provides for an elaborate administrative scheme whereby plaintiffs are to exhaust their administrative remedies before seeking relief in federal court. *See* 20 U.S.C. §1415(e); *see also* Minn.Stat. 120.17 (implementing IDEA's required procedural safeguards). The exhaustion doctrine embraces the principles that "agencies, not the courts, ought to have primary responsibility for the programs that Congress has charged them to administer," and that an agency "ought to have an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court." *McCarthy v. Madigan*, 503 U.S. 140, 145, 112 S.Ct. 1081, 1086, 117 L.Ed.2d 291 (1992) (recognizing purposes of exhaustion of protecting administrative agency authority and promoting judicial efficiency); *McKart v.*

United States, 395 U.S. 185, 193, 89 S.Ct. 1657, 1662, 23 L.Ed.2d 194 (1969).

[10] When considering exhaustion of administrative remedies under the IDEA, courts have recognized that exhaustion of the administrative process "allows for the exercise of discretion and educational expertise by state and local agencies, affords full exploration of technical educational issues, furthers development of a complete factual record, and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children." *See Hoeft v. Tucson Unified School Dist.*, 967 F.2d 1298, 1303 (9th Cir. 1992); *see also Hendrick Hudson Bd. of Ed. v. Rowley*, 458 U.S. 176, 207-08, 102 S.Ct. 3034, 3051-52, 73 L.Ed.2d 690 (1982) (acknowledging that Congress has left difficult questions of educational practices and policies primarily to the expertise of state and local agencies).

[11] Notwithstanding the strong policies in favor of exhaustion, the IDEA's exhaustion requirement is not absolute. Courts, relying in part on legislative history, have recognized exceptions to IDEA's exhaustion requirement when "the pursuit of administrative remedies would be futile or inadequate; waste resources, and work severe or irreparable harm on the litigant; or when the issues raised involve purely legal questions." *Pihl v. Massachusetts Dept. of Educ.*, 9 F.3d 184, 190 (1st Cir. 1993); *see also Honig v. Doe*,

484 U.S. 305, 327, 108 S.Ct. 592, 606, 98 L.Ed.2d 686 (1988) (recognizing exception to exhaustion of administrative remedies when such action would be futile or inadequate); *Komninos by Komninos v. Upper Saddle River Board of Educ.*, 13 F.3d 775, 778-79 (3d Cir. 1994) (exercising caution when determining whether to allow exception to the exhaustion requirement); *Independent School Dist. 623, Roseville, Minn. v. Digre*, 893 F.2d 987, 992 (8th Cir. 1990). Moreover, courts have not required exhaustion when an agency has adopted a policy or pursued a practice of general applicability that is contrary to law. *See Mrs. W. v. Tirozzi*, 832 F.2d 748, 756 (2d Cir. 1987); *see also* H.R.Rep. No. 99-296, at 7 (1985), U.S. Code Cong. & Admin. News at 1798, 1809 (stating that administrative review procedures are not required in situations in which "(1) it *1393 would be futile to use the due process procedures; (2) an agency has adopted a policy or pursued a practice of general applicability that is contrary to the law; (3) it is improbable that adequate relief can be obtained by pursuing administrative remedies (e.g., the hearing officer lacks the authority to grant the relief sought)"). It is the plaintiffs' burden to demonstrate that their circumstances warrant excusal from the administrative procedures. *See, e.g., Honig*, 484 U.S. at 327, 108 S.Ct. at 605.

[12] Although plaintiffs acknowledge that they have not exhausted their administrative remedies prior to

filing this civil action, plaintiffs argue that their case warrants exercise of the "futility" exception. Pursuit of administrative procedures would be futile if "the agency either was acting in violation of the law or was unable to remedy the alleged injury." *Heldman v. Sobol*, 962 F.2d 148, 159 (2d Cir. 1992). Here, plaintiffs seek the on-site provision of paraprofessional assistance at private religious schools, which plaintiffs allege is prohibited by state regulation. Plaintiffs brought this civil action challenging the state regulation and school district policies as unconstitutional and in violation of federal statute. Neither the hearing officer nor the Commissioner has authority to alter the state rule to include a private religious school as a permissible location for special education services. *See* Minn.Stat. §120.17, subd. 3 (providing that the state board of education shall adopt rules implementing the statute); Minn.Stat. §121.02, subd. 1 (creating a state department of children, families, and learning, which is maintained by the state board of education); Minn.Stat. §121.16 (stating that the Commissioner of the department shall be the secretary of the state board and shall make recommendations to the board). The court agrees that resort to the administrative process would be an exercise in futility. Thus, the court concludes that plaintiffs' challenge falls within the IDEA's futility exception to the exhaustion requirement.

5. Eleventh Amendment Immunity

The plaintiffs seek declaratory, injunctive, and monetary relief, and allege constitutional violations pursuant to 42 U.S.C. §1983, and statutory violations. The State defendants argue that they cannot be sued for damages in their official capacities under 42 U.S.C. §1983. Furthermore, the State defendants argue that the plaintiffs allege violations against the State and, as such, their claims are thus subject to Eleventh Amendment immunity. In addition, the State defendants argue that in their personal capacities they are entitled to qualified immunity under 42 U.S.C. §1983.

[13][14][15][16][17] As a general rule, the Eleventh Amendment bars suits brought in federal court against states and their agencies in the absence of consent by the state or express abrogation by Congress within its authority. *See Seminole Tribe of Florida v. Florida*, ___ U.S. ___, ___-___, 116 S.Ct. 1114, 1122-23, 134 L.Ed.2d 252 (1996). By enacting 42 U.S.C. §1983, Congress did not abrogate Eleventh Amendment immunity. *See Quern v. Jordan*, 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979). Notwithstanding lack of state consent or congressional abrogation, however, civil actions in federal court which seek injunctive relief against state officials are not always barred by the Eleventh Amendment. *Ex parte Young*, 209 U.S. 123, 155-56, 28 S.Ct. 441, 451-52, 52 L.Ed. 714 (1908). The Eighth Circuit

Court of Appeals has explained that "'*Ex parte Young* recognized that suits may be brought in federal court against state officials in their official capacities for prospective injunctive relief to prevent future violations of federal law.'" *Treleven v. University of Minnesota*, 73 F.3d 816, 819 (8th Cir. 1996) (quoting *Fond du Lac Band of Chippewa Indians v. Carlson*, 68 F.3d 253, 255 (8th Cir. 1995)); *In re SDDS, Inc.*, 97 F.3d 1030, 1035 (8th Cir. 1996) (recognizing *Ex parte Young* doctrine as a fundamental exception to Eleventh Amendment immunity). Furthermore, state officials are "persons" under §1983 when sued pursuant to the *Ex parte Young* doctrine because "such actions 'are not treated as actions against the State.'" *Treleven*, 73 F.3d at 819 (quoting *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 n.10, 109 S.Ct. 2304 n.10, 2312, 105 L.Ed.2d 45 (1989)). The plaintiffs concede that they only seek declaratory *1394 and injunctive relief against the State defendants on their §1983 claims, and that they do so under the *Ex parte Young* doctrine.[1]

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[1]Plaintiffs claim that they bring their suit against the State defendants in both their individual and official capacities. *See* Plaintiffs' Memorandum of Law in Opposition to Defendants' Motions to Dismiss. The plaintiffs, citing the *Ex Parte Young* doctrine, claim that the "individual capacity action" provides the basis for declaratory and injunctive relief from allegedly unconstitutional actions taken under color of state law,

Continued on Next Page

Because the plaintiffs seek injunctive relief against the State defendants in their official capacities for alleged violations of federal law, the court concludes that the §1983 claims against the state defendants are not barred by the Eleventh Amendment. *See, supra*, Footnote 1. Because the plaintiffs do not seek damages from the State defendants, the court need not address the issue of qualified immunity. The court dismisses the plaintiffs' claims alleged against the State defendants in their individual capacities.

[18] Plaintiffs assert that Congress has abrogated States' Eleventh Amendment immunity with respect to IDEA claims. A court conducts a two-fold inquiry to

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[1] Continued from previous page...

and that the "official capacity action" is really a suit against the State on the IDEA claim. Because courts recognize that the *Ex Parte Young* doctrine is an exception to Eleventh Amendment immunity in which state officials may be sued in their official capacities for prospective injunctive relief, the court concludes that the entire action is a suit against the State defendants in their official capacities. *See, e.g., Treleven v. University of Minnesota*, 73 F.3d 816, 819 (8th Cir. 1996). To clarify, the court considers the §1983 claims to be alleged against the State defendants in their official capacities, and dismisses plaintiffs' claims to the extent that they are asserted against the State defendants in their individual capacities.

determine whether Congress has abrogated States' immunity from suit: first, a court must determine whether Congress has "'unequivocally expressed'" its intent; and second, a court must determine whether Congress has acted "'pursuant to a valid exercise of power.'" *See Seminole Tribe*, ___ U.S. at ___, 116 S.Ct. at 1123 (quoting *Green v. Mansour*, 474 U.S. 64, 68, 106 S.Ct. 423, 426, 88 L.Ed.2d 371 (1985)).

[19] Under 20 U.S.C. §1403, Congress unequivocally expressed its intent to abrogate States' immunity from suit for any violations that occur in whole or part after October 30, 1990. *Compare Dellmuth v. Muth*, 491 U.S. 223, 232, 109 S.Ct. 2397, 2402-03, 105 L.Ed.2d 181 (1989) (holding that the statutory language of the Education of the Handicapped Act ("EHA"), 20 U.S.C. §1400, *et seq.*, failed to "evince an unmistakably clear intention to abrogate the States' constitutionally secured immunity from suit") *with* 20 U.S.C. §1403(a) (1990) (stating under subsection entitled "State immunity abrogated," that a State "shall not be immune under the [E]leventh [A]mendment to the Constitution of the United States from suit in Federal court for a violation" of the IDEA). In addition, Congress enacted the IDEA pursuant to a valid exercise of its powers under §5 of the Fourteenth Amendment of the U.S. Constitution. *See Seminole Tribe*, --- U.S. at ----, 116 S.Ct. at 1125 (recognizing the enforcement provision of the Fourteenth Amendment as valid authority for Congress

to abrogate States' immunity from suit in federal court); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456, 96 S.Ct. 2666, 2671, 49 L.Ed.2d 614 (1976); *see also Dellmuth*, 491 U.S. at 227, 109 S.Ct. at 2399- 2400 (recognizing the parties' concessions that the EHA was enacted pursuant to Congress' authority under §5 of the Fourteenth Amendment); 20 U.S.C. §1400(b)(9) (finding of Congress that it is in "the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of children with disabilities in order to assure equal protection of the law"). The court is satisfied that Congress abrogated States' immunity under the Eleventh Amendment.

6. Failure to State a Claim

a. Constitutional Claims

Section 1983 of Title 42 creates no substantive rights, but provides a remedy when rights secured by federal law or the Constitution are deprived under color of state law. *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 924, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982). An underlying constitutional right must exist before a cause of action under section 1983 will lie. Plaintiffs must show ***1395** that defendants violated a right, privilege or immunity protected by the Constitution or laws of the United States.

[20] Plaintiffs allege violations of the Freedom of Speech and Free Exercise of Religion Clauses of the

First Amendment, and violations of the Equal Protection Clause of the Fourteenth Amendment. Both the State defendants and the school districts assert that plaintiffs have failed to allege cognizable constitutional violations because the challenged regulation and policies distinguish between public and nonpublic schools. The school districts further contend that the policies regarding the location of services are neutral policies of general applicability which do not permit on-site special education services at any nonpublic school, regardless of whether the school is religious or nonreligious. Plaintiffs oppose defendants' position as ignoring the standard of review for a motion to dismiss. The court has reviewed the complaint and the attached exhibits. Construing plaintiffs' allegations in the most favorable light, the court concludes that plaintiffs have sufficiently alleged that defendants treat nonpublic religious schools differently from nonpublic nonreligious schools with respect to on-site paraprofessional services. Such allegations sufficiently allege violations of the First and Fourteenth Amendments of the U.S. Constitution to overcome defendants' motions to dismiss. *See Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, ___, 115 S.Ct. 2510, 2517, 132 L.Ed.2d 700 (1995) (discussing government regulation of speech because of content or viewpoint of message); *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531-33, 113 S.Ct. 2217, 2226, 124 L.Ed.2d 472 (1993) (discussing need for compelling government interest

when law is not neutral and of general applicability as to religion); *City of Cleburne v. Cleburne Living Center., Inc.*, 473 U.S. 432, 440, 105 S.Ct. 3249, 3254-55, 87 L.Ed.2d 313 (1985) (discussing level of scrutiny applied to state law which impinges on personal rights protected by the Constitution). Thus, defendants' motions to dismiss plaintiffs' constittional claims must be denied.

b. Religious Freedom Restoration Act Claim

Under Count IV of the complaint, plaintiffs allege that defendants' policies and actions violate plaintiffs' rights under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§2000bb *et seq*. In their submissions to the court, the State defendants challenged the constitutionality of RFRA. Pursuant to 28 U.S.C. §2403(a), the court certified notification of the challenge to RFRA's constitutionality to the United States Department of Justice. The United States requested leave to intervene in this action for the limited purpose of defending the constitutionality of RFRA. The court granted the United States' request pursuant to 28 U.S.C. §2403(a), and Rule 24(a) of the Federal Rules of Civil Procedure.

On October 15, 1996, the Supreme Court granted writ of certiorari to review *Flores v. City of Boerne*, 73 F.3d 1352 (5th Cir. 1996), which presents the issue of the constitutionality of RFRA. The parties agree that

the pending motions may be resolved without addressing the RFRA claim; thus, the court does not address the RFRA claim or constitutional challenge at this time.

c. IDEA Claim

[21] Defendants move to dismiss plaintiffs' IDEA claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Because the plaintiffs have moved for partial summary judgment on this claim, the court has reviewed affidavits submitted by all parties with respect to this claim. Because the court has considered materials outside of the pleadings as to this count, the court concludes that it is proper to consider defendants' motions to dismiss as cross-motions for partial summary judgment. In making this determination, the court considered plaintiff's concession that, if the court is persuaded by defendants' analysis of the IDEA claim, then the defendants would be entitled to prevail on that claim. *See* Plaintiffs' Memorandum in Support of Motion for Partial Summary Judgment at 17.

*1396 B. Plaintiffs' Motion for Partial Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment

as a matter of law." Thus, in order for the moving party to prevail, it must demonstrate to the court that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2553-54, 91 L.Ed.2d 265 (1986); Fed.R.Civ.P. 56(c). A fact is material only when its resolution affects the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). A dispute is genuine if the evidence is such that it could cause a reasonable jury to return a verdict for either party. *Id.* at 252, 106 S.Ct. at 2510.

On a motion for summary judgment, all evidence and inferences are to be viewed in a light most favorable to the nonmoving party. *Id.* at 250, 106 S.Ct. at 2511. The nonmoving party, however, may not rest upon mere denials or allegations in the pleadings, but must set forth specific facts sufficient to raise a genuine issue for trial. *Celotex*, 477 U.S. at 324, 106 S.Ct. at 2553. Moreover, if a plaintiff cannot support each essential element of its claim, summary judgment must be granted because a complete failure of proof regarding an essential element necessarily renders all other facts immaterial. *Id.* at 322-23, 106 S.Ct. at 2552-53. With this standard at hand, the court considers the issue of partial summary judgment on plaintiffs' IDEA claim.

Whereas the plaintiffs argue that the plain language of Minnesota Rule 3525.1150 and the school districts' denial of services to Sarah Peter and Aaron Westendorp violates the U.S. Constitution by allegedly discriminating in the provision of special education services on the basis of the religious content and viewpoint of a private school's instructional programs, the plaintiffs accept defendants' factual statements for purposes of their motion for partial summary judgment on the IDEA claim.[2] Thus, for the purposes of this motion, the plaintiffs accept that the school districts deny on-site services to all children attending private schools, religious or nonreligious. Plaintiffs maintain that the IDEA and its regulations mandate that on-site special education services be provided at nonpublic schools to students whose special education needs are such that they require individualized paraprofessional services in their regular classrooms.

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[2]Plaintiffs assert that they did not focus on the IDEA claim in their motion for a preliminary injunction because the state regulations, on their face, do not exclude students attending all private schools from on-site services but only those attending private religious schools. Plaintiffs advise the court that if they prevail on the IDEA claim, their preliminary injunction motion would become moot since the partial summary judgment would effectively provide them with the immediate prospective relief they seek. Therefore, the court first considers plaintiffs' motion for partial summary judgment.

The defendants oppose plaintiffs' motion. Defendants assert that the IDEA and its regulations do not require the school districts to provide on-site special education services to children in nonpublic schools.[3] The defendants argue that their policies are consistent with the IDEA and its regulations which distinguish between public school students and unilaterally-placed private school students. In support of their argument, the defendants refer the court to the IDEA and its regulations, the Department of Education's interpretations, and decisions from other courts which have addressed the issue.

The IDEA conditionally provides federal grants to states which then provide local school districts with funds to establish special education services for children with disabilities. To qualify for assistance from the federal government, states must adopt a policy *1397 that "assures all children with disabilities the right to a free appropriate public education." 20 U.S.C. §1412(1). To achieve this objective, each state must also develop a plan. 20 U.S.C. §1412(2). To receive payments, each local school district must

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[3]In addition to disagreeing with plaintiffs as to the interpretation of the IDEA and its regulations, defendants also oppose plaintiffs' motion by raising arguments previously addressed by the court. Because the court has already analyzed the issues of standing, exhaustion, and ripeness, the court relies on its preceding discussion of those issues.

develop an individualized education program ("IEP") for each child with a disability identifying the special education services that are necessary to meet that child's needs, and offer to provide those services at public expense. 20 U.S.C. §§1412(4), 1414(a)(1), (5). The statutory provisions and regulations differentiate between three categories of students with disabilities: (1) students who attend public schools; (2) students who have been placed in private schools by the school district; and (3) students who have been placed in private schools by the unilateral, or voluntary placement of a parent. *See Fowler v. Unified School Dist. No. 259*, 107 F.3d 797 (10th Cir. 1997) (reciting categories with reference to statutory provisions); see also 20 U.S.C. §§1412(1), (2)(B), 1413(a)(4)(A), (B); 34 C.F.R. §§300.400-.452, 76.650-.655; *Cefalu v. East Baton Rouge Parish School Bd.*, 103 F.3d 393, 396-97 (5th Cir. 1997) (tracing the statutory and regulatory provisions); *K.R. by M.R. v. Anderson Community School Corp.*, 81 F.3d 673, 678 (7th Cir. 1996) (describing categories and benefits conferred for each), *petition for cert. filed*, 65 U.S.L.W. 3166 (U.S. Aug. 26, 1996) (No. 96-323).

Under the IDEA, students in public school are to receive all special education and related services at public expense. *See* 20 U.S.C. §§1401(a)(18); 1412(1) & (2)(B), 1412(4), 1414(a)(5); *see also Fowler*, 107 F.3d at 801; *Anderson*, 81 F.3d at 678. Similarly, children referred to private schools by the State or

school district are provided special education and related services at no cost to their parents. *See* 20 U.S.C. §1413(a)(4)(B); 34 C.F.R. §300.401 (providing that student who is placed in private school by state or local agency is to be provided special education and related services has all the rights of a child with a disability who is served by a public agency and is to receive the benefits at no cost to the parents). In contrast, the statutory provisions and accompanying regulations speak differently about students who voluntarily attend private schools.

The statute requires that each state's plan must set forth policies and procedures to assure that: to the extent consistent with the number and location of children with disabilities in the State who are enrolled in private elementary and secondary schools, provision is made for the participation of such children in the program assisted or carried out under this subchapter by providing for such children special education and related services.... 20 U.S.C. §1413(a)(4). The regulations further provide that if a child with a disability has a "free appropriate public education" available, and the parents choose to place the child in a private school or facility, the public agency is not required to pay for the child's education at the private school; however "the public agency shall make services available to the child as provided under §§300.450-300.452." 34 C.F.R. §300.403. Any disagreements as to the availability of a program and

the question of financial responsibility is subject to the due process procedures provided for by the statute and its regulations. Id. Similar to the statutory provision, the regulation provides that the state agency is to ensure that, "to the extent consistent with their number and location in the State, provision is made for the participation of private school children with disabilities in the program assisted or carried out under this part by providing them with special education and related services." 34 C.F.R. §300.451. Also, the state agency must ensure that the requirements of 34 C.F.R. §§76.651-76.662 are met. *Id*. In addition, each local school district must provide special education and related services "designed to meet the needs of private school children with disabilities residing in the jurisdiction of the agency." 34 C.F.R. §300.452.

The incorporated regulations are from the Education Department's General Administrative Regulations ("EDGAR"). See 34 C.F.R. §§76.651-76.662. The EDGAR provisions recognize that under some programs, the authorizing statute requires that a State and its subgrantees (the local education agencies) provide for participation by students enrolled *1398 in private schools; thus, the provisions provide rules for that participation. The local education agency is to "provide students enrolled in private schools with a genuine opportunity for equitable participation" and to "provide that opportunity to participate in a manner that is consistent

with the number of eligible private school students and their needs." 34 C.F.R. §76.651(a)(1), (2). In forming the program, the local education agency is to consult with appropriate representatives of students enrolled in private schools and consider which children will receive benefits; how the children's needs will be identified; what benefits will be provided; and how the benefits will be provided. 34 C.F.R. §76.652(a)(1), (2), (3), (4). The local education agency must consider the student needs, student numbers, and benefits provided under the program on a basis comparable to that used in providing for participation of public school students. 34 C.F.R. §76.653. The program benefits that are provided for students enrolled in a private school "must be comparable in quality, scope, and opportunity for participation to the program benefits that the subgrantee provides for students enrolled in public schools." 34 C.F.R. §76.654(a).

Defendants argue that the statute and its implementing regulations provide the state and the local school districts with broad discretion in determining whether to provide special education to students voluntarily attending private schools. This position is consistent with that taken by the Department of Education in interpreting its own regulations. The Department of Education has, on numerous occasions, consistently stated its position with respect to the provision of special education services for students who voluntarily attend private schools. 49 Fed.Reg.

48522 (Dec. 12, 1984) (stating position of Department that special education services are not required to be provided "to each and every private school handicapped child"); Letter to McConnell, 22 Indiv. with Disabilities Educ. L. Rep. 369 (1994) (recognizing Department's position that a school district's obligation to students voluntarily attending private schools is not the same as that owed to students publicly placed at private schools); Letter to Schmidt, 20 Indiv. with Disabilities Educ. L. Rep. 1224 (1993) (stating that students voluntarily attending private school do not have "an individual entitlement to services"; therefore, school districts are not required to provide such services); Letter to Mentink, 18 Indiv. with Disabilities Educ. L. Rep. 276 (1991) (reiterating Department's position that a public agency may elect not to serve every parentally-placed child residing in its jurisdiction, and is not required to make the full range of services available to students of whom it has elected to serve); Letter to Livingston, 17 Education for the Handicapped L. Rep. 523, 524-25 (1991) (responding that if free appropriate public education is made available to a child with disabilities, but the parents choose to place their child in a private school, the local school district is not obligated to provide the child with free appropriate public education at the private school and the local agency may "elect not to serve every parentally-placed child esiding in its jurisdiction"); Letter to Williams, 18 Indiv. with Disabilities Educ. L. Rep. 742, 743-44 (1991) (stating

that private school students do not have an individual entitlement to receive special education and related services). The court is mindful that an agency's interpretations are to be given weight by the court unless the interpretations are plainly erroneous or inconsistent with the regulations. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 510-12, 114 S.Ct. 2381, 2386, 129 L.Ed.2d 405 (1994). Defendants urge the court to yield substantial deference to the Department's interpretations.

Although courts readily recite the statutory provisions and regulations, there is grave disagreement as to their meaning and application, particularly in a situation such as this, when a student requires on-site, individualized, special education services. *Fowler*, 107 F.3d at 809 (cautioning that their holding may "have a very short shelf life" considering that petitions for *certiorari* have been filed in other cases seeking guidance from the Supreme Court on this issue); *Cefalu*, 103 F.3d at 397 (warning that when an attempt is made to apply the statutory and regulatory provisions to such a situation, "the IDEA and its implementing regulations are amorphous ***1399** in design and imprecise in message"); *Anderson*, 81 F.3d at 678 (referring to the IDEA and its regulations as a "complex set of statutory and regulatory provisions"). Because the Eighth Circuit Court of Appeals has not addressed the issues presented. this court by necessity

looks to the other Circuit Court of Appeals' decisions for guidance.

The parties agree that there is a split in the decisions of the circuit courts that have addressed this issue and, since the parties' briefing and hearing on the issue, that split has widened. As stated, the courts have reached varying results, ranging from deferring broad discretion to the state and local school districts to requiring the state and local school districts to provide special education services to students at private schools. *See Fowler*, 107 F.3d at 807 (determining that when the cost of special services does not vary with the location of the services, that it is "a fair and reasonable interpretation of the Act and regulations to require the District to pay the same amount" toward the on-site service that the student needs in the private school setting, as "the average amount the District pays for such services" in the public schools); *Cefalu*, 103 F.3d at 398 (proclaiming burden-shifting rule in which the private school student "must make an initial showing of a genuine need for on-site services, based upon more than mere convenience"; if the student makes the showing, then "the agency must provide on-site services unless it presents a justifiable reason, either economic or non-economic, for its denial of on-site services; and finally, the student then bears the burden of "showing that the agency's position is inconsistent with the IDEA and its regulations, or is not rationally supportable, or is otherwise arbitrary"); *Russman by*

Russman v. Sobol, 85 F.3d 1050, 1056-57 (2d Cir. 1996) (determining that the IDEA and regulations were more consistent with mandatory entitlements than broad discretion and required school district to provide on-site special education services at private school when economies of scale were not affected by the location of the services), *petition for cert. filed*, 65 U.S.L.W. 3381 (U.S. Nov. 18, 1996) (No. 96-776); *Anderson*, 81 F.3d at 680 (determining that the IDEA and its regulations do not require a public school to make "comparable provisions for a disabled student oluntarily attending private school as for disabled public school students"); *Goodall by Goodall v. Stafford County Sch. Bd.*, 930 F.2d 363, 369 (4th Cir.) (concluding that when the special education services are provided at a public school, the school district is in full compliance with the requirements of the statute and the regulations; if the services are meaningless, it is because of the parents' decisions and conditions for the student's education and not by the operation of any state or federal law), *cert. denied*, 502 U.S. 864, 112 S.Ct. 188, 116 L.Ed.2d 149 (1991).

[22][23] In analyzing the statute, its regulations, and the decisions which have addressed the issue, the court is persuaded that the statute and its regulations differentiate among categories of students with disabilities depending upon whether the student attends a public school or private school; and, if the student attends a private school, whether the student was

publicly or unilaterally placed in the private school setting. In addition, the court is mindful of the discretion that is generally afforded to the state and local school districts when decisions in educational policy are implicated, particularly when the allocation of scarce resources is involved. Notwithstanding decisions that have held otherwise, the court determines that broad discretion to the state and local school districts is appropriate in light of the statute, its implementing regulations, and the Department of Education's position. The court is persuaded by the *Anderson* court's analysis that Congress intended to give disabled students voluntarily attending private school a lesser entitlement under the statute. *Anderson*, 81 F.3d at 678. Although programs provided to private school children must be comparable in quality, scope, and opportunity, the comparability requirement is confined to the program benefits which the agency elects to provide to unilaterally- placed students. *Id.* This is not to say that there are not circumstances in which a state or local school district could be found to have abused its discretion, but the plaintiffs have not made that allegation, and those facts are not before the court. Thus, the court concludes that the statute and its regulations do ***1400** not require the State defendants or local school districts to provide on-site paraprofessional services to the plaintiffs at private schools as a component of their individualized education program. Because the court decides that there is no individual entitlement to services under the

IDEA and its regulations for unilaterally-placed private school children with disabilities who require individualized services, the court need not address whether the Establishment Clause provides a justification for the denial of publicly funded on-site assistance. The court concludes that the defendants are entitled to partial summary judgment on the IDEA count.

C. Plaintiffs' Motion for Preliminary Injunction

Plaintiffs seek a preliminary injunction enjoining the defendants from enforcing Minnesota Rule 3525.1150, and forcing defendants to provide on- site paraprofessional services to otherwise eligible disabled students who attend private schools, religious or nonreligious. Because the court has determined that the IDEA and its regulations do not require that the State and local school districts provide such services, the court considers plaintiffs' motion only as to its remaining constitutional and RFRA claims.

[24][25] The court considers four factors in determining whether to grant the plaintiffs' motion for a preliminary injunction:

1. Is there a substantial threat that the plaintiffs will suffer irreparable harm if relief is not granted;
2. Does the irreparable harm to the plaintiffs outweigh any potential harm that granting a

preliminary injunction may cause the defendants;

3. Is there a substantial probability that the plaintiffs will prevail on the merits; and
4. The public interest.

Dataphase Sys., Inc. v. C L Sys., Inc., 640 F.2d 109, 114 (8th Cir. 1981) (*en banc*). The court balances the four factors to determine whether a preliminary injunction is warranted. *Id.* at 113; *West Publishing Co. v. Mead Data Cent. Inc.*, 799 F.2d 1219, 1222 (8th Cir. 1986), *cert. denied*, 479 U.S. 1070, 107 S.Ct. 962, 93 L.Ed.2d 1010 (1987). The plaintiffs bear the burden of proof concerning the four factors. *Gelco Corp. v. Coniston Partners*, 811 F.2d 414, 418 (8th Cir. 1987). The plaintiffs' burden is even greater when the movants are not seeking to maintain the status quo, but rather are seeking to obtain the same relief they would receive after a trial on the merits. *See Sanborn Mfg. Co., Inc. v. Campbell Hausfeld/Scott Fetzer Co.*, 997 F.2d 484, 486 (8th Cir. 1993) (stating heavier burden); *Calvin Klein Cosmetics Corp. v. Lenox Laboratories, Inc.*, 815 F.2d 500, 503 (8th Cir. 1987) (recognizing that a preliminary injunction is an extraordinary remedy). In this instance, the plaintiffs do not seek to maintain the status quo, rather they seek an order enjoining allegedly inequitable enforcement of Minnesota Rule 3525.1150, and requiring defendants to provide on-site paraprofessional services to plaintiffs at private religious schools.

[26][27][28] Plaintiffs must first establish that harm will result without injunctive relief and that the harm will not be compensable by money damages. Possible or speculative harm is not enough. The absence of such a showing alone is sufficient to deny a preliminary injunction. *Gelco*, 811 F.2d at 420; *Roberts v. Van Buren Pub. Schools*, 731 F.2d 523, 526 (8th Cir. 1984). The defendants argue that plaintiffs have not been harmed because they are receiving a "free appropriate public education" at their respective public schools. Plaintiffs, however, urge that they have been denied constitutional rights which constitutes irreparable harm. Whereas a constitutional violation constitutes irreparable harm, in this instance the plaintiffs do not deny that they are receiving the paraprofessional services which they seek at the public school.

The second *Dataphase* requirement is that the harm to plaintiffs must outweigh the potential harm that granting a preliminary injunction may cause defendants. *Dataphase*, 640 F.2d at 114. Defendants urge that the relief which plaintiffs seek could have broad reaching effects on the State and local school districts in their ability to allocate limited resources within their budgets. If the plaintiffs were to prevail in this action, the defendants request that the court enjoin enforcement of the regulation and alleged policies altogether, such that on-site paraprofessional services would not be provided for students attending nonpublic

schools, regardless *1401 of the religious or nonreligious nature of the curriculum. The court finds that defendants would be harmed if injunctive relief were granted and, upon balancing the harms, finds the balance weighs against granting injunctive relief.

The third *Dataphase* factor requires plaintiffs to establish a reasonable probability of success on the merits. In this instance, plaintiffs assert that the defendants differentiate in their provision of on-site special education services between nonpublic religious schools and nonpublic nonreligious schools. Plaintiffs have not submitted admissible evidence substantiating their allegations, but the court recognizes that their ability to conduct discovery has been hindered by court order staying discovery. In their submissions, defendants claim that they enforce and implement a neutral policy which does not differentiate between the nonpublic-religious schools and nonpublic-nonreligious schools.

The final *Dataphase* factor requires the court to consider the public interest. *Dataphase*, 640 F.2d at 114. The public has an interest in assuring that the state and local school districts comply with the U.S. Constitution and federal statutes by promulgating and enforcing regulations and policies within the confines of the law. The ability of the State and local school districts to maintain fiscal responsibility and to equitably allocate scarce resources among students in

need of special education services is also important to the public interest.

In balancing the *Dataphase* factors, the court has considered the broad discretion that the state and local school districts have in providing educational services and defining educational policy. As such, the type of injunctive relief that the defendants propose in opposition to plaintiffs' request for relief would be more appropriate in this case should the plaintiffs prevail on the merits of their claims at the disposition of this action. The court concludes that even if the plaintiffs were to prevail on their constitutional and federal claims, it would be inclined to enjoin enforcement of the regulations and policies to reflect the policies to which the defendants urge they currently adhere: that defendants do not provide on-site paraprofessional services to any student voluntarily attending private school, regardless of the school's religious or nonreligious nature. Thus, plaintiffs' motion for preliminary injunction is denied.

CONCLUSION

Based on the foregoing, IT IS HEREBY ORDERED that:

1. Plaintiffs' motion for preliminary injunction is denied (Docket Nos. 3 and 20);

2. Plaintiffs' motion for partial summary judgment is denied (Docket No. 67);

3. Defendants' motions to dismiss are granted in part and denied in part (Docket Nos. 13, 27, and 29). Defendants' motions to dismiss plaintiff Choice in Education Foundation, Inc., as a party to this action are granted. Defendants' motions to dismiss, converted to cross-motions for partial summary judgment as to the IDEA count (Count V), are granted. Defendants' motions to dismiss the State defendants in their individual capacities are granted. Otherwise, defendants' motions to dismiss are denied;

4. Plaintiffs' objections to Magistrate Judge Jonathon Lebedoff's order staying discovery are denied as moot.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-3268MNMI

Joan Peter, et al.

Appellants,

v.

Robert Wedl, et al.,

Appellees.

Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. Judge McMillan and Judge Richard S. Arnold would grant the petition. The petition for rehearing by the panel is also denied.

(5128-010199)

September 30, 1999

Order Entered at the Direction of the Court:
/s/Clerk, US Court of Appeals. Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-3268MNMI

Joan Peter, et al.
Appellants,

v.

Robert Wedl, Commissioner, et al.,
Appellees.

Appeal from the US District Court for the District of Minnesota

Appellants' Application to the Chief Judge of the Circuit for Leave to File Motion for Reconsideration in Light of New Eighth Circuit Decision is referred by the Chief Judge to the active judges of the Court, as well as to Judge Ross and Judge Magill.

Appellants are directed to file 21 copies of the Application with the Clerk of the Court by November 24, 1999. Appellees shall file their opposition to the Application on or before December 6, 1999.

November 9, 1999
Order Entered at the Direction of the Court:
/s/Clerk, US Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-3268MNMI

Joan Peter, et al.

Appellants,

v.

Robert Wedl, et al.,

Appellees.

Appeal from the US District Court for the District of Minnesota

There being no provision in this Court's rules for the filing of an application for reconsideration of an order denying a petition for rehearing en banc, appellants' application for such relief is denied.

(5120-010199)

December 27, 1999

Order Entered at the Direction of the Court:
/s/Clerk, US Court of Appeals, Eighth Circuit.

STATE OF MINNESOTA
OFFICE OF THE ATTORNEY GENERAL

BUSINESS REGULATORY SECTION
SUITE 1200
445 MINNESOTA STREET
ST. PAUL, MN 55101-2130
TELEPHONE: (612) 296-9412

June 24, 1997

Michael Paulsen, Esquire
University of Minnesota Law School
229 19th Ave South
Minneapolis, MN 55455

Re: Peter Westendorp, et al. v. Bruce H. Johnson, Commissioner, et al.

Dear Michael:

We are aware of the *Agostini v. Felton* case that was decided yesterday by the U. S. Supreme Court We are currently reviewing this case and considering its implications for the *Peter v. Johnson* et al. lawsuit. We propose putting the *Peter* case on hold until June 27th.After that point, we will contact you to discuss how the *Agostini* case may impact the *Peter* litigation.

Please feel free to contact me if you have any questions about this letter.

Yours very truly,

/s/RACHEL L. KAPLAN
AssistantAttorney General
Education Division

cc: Daniel Bowles, Esq.
Daniel T. Kadlec, Esq.
Scott Anderson, Esq.
Brian Maguire, Esq.

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June 24, 1997

Rachel Kaplan
Steve Liss
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Scott Anderson
Brian Maguire
Ratwick, Roszak & Maloney, P.A.
730 Second Ave S.
Minneapolis, MN 55402

By Fax and US Mail

Re: Peter v Johnson, No. 4-96-642.

Dear counsel:

I have received Rachel Kaplan's letter of today, noting the Supreme Court's decision in *Agostini*. We believe that *Agostini* very strongly confirms plaintiffs' position in this litigation.

Let me propose the following for discussion, as a framework for resolving this case. If all defendants will agree to the entry of a declaratory judgment and permanent injunction (i) invalidating Rule 3525.1150 to the extent that it forbids provision of on-site special education services to children with disabilities attending private religious schools; and (ii) mandating that plaintiffs be given special education services by their school districts, in accordance with their needs, on the premises of their chosen private religious schools, we would agree to stop the meter running on attorneys fees with respect to the merits aspect of the litigation, as of the date you agreed to such relief. We would also cancel the depositions currently noticed for July 11, 16, 18, and 30.

There would remain the relatively minor issue of appropriate damages awards for the individual families (which, as I have said previously, should be relatively small). We would not seek to recover an award of attorneys fees while we negotiated this issue. There would also remain the issue of an appropriate attorneys fees award. We would not waive the right to recover attorneys fees for that time spent negotiating or litigating the fee award issue, though we feel it would be in the best interests of all of our respective clients to resolve that issue with as little additional expenditure of time as possible.

Rachel Kaplan's letter suggested that the state would need until June 27 in order to evaluate *Agostini*. I would urge you to consult with Scott Anderson and Brian Maguire prior to that date, however, as Scott (if memory serves) will be leaving for vacation right around that time, and might not be available after that until July 7.

In the meantime, we will continue our work on behalf of our clients in this case. You should know that we are considering bringing a motion for preliminary injunction, based on the *Agostini* case and information already produced in discovery. To enable us to obtain relief for our clients in time for the 1997—98 academic year, it would be necessary for us to file such a motion very soon. By our calculations, in order to get such a motion heard and decided in time, we probably would need to file it no later than Friday, June 27. If at all possible, it would be good to hear from you concerning this proposal before then.

I sincerely hope that the Supreme Court's decision in *Agostini* can serve to provide the framework for us to resolve the remaining issues in this litigation.

Sincerely,

/s/Michael Stokes Paulsen
Counsel for Plaintiffs

cc Dan Kadlec, Dan Bowles, Erik Hawes
Krista Westendorp
Joan Peter

A.G.'s Ofc. Bus. Reg. Fax: 612-296-7438 Jun 27 '97 17:20 [Time/Date/Header at top of all 3 pages]

Attorney General's Office 1200 NCL Tower, 445 Minnesota Street, St.Paul MN 55101-2130

FAX COVER MEMO
Date: June 27, 1997
Number of pages including cover sheet: 3

To: Michael Paulsen Esq

Phone:
Fax phone: 625-2011

From: Rachel L. Kaplan
Phone:(612) 296-9583
Fax phone: (612) 296-7438

STATE OF MINNESOTA
OFFICE OF THE ATTORNEY GENERAL

BUSINESS REGULATORY SECTION
SUITE 1200
445 MINNESOTA STREET
ST. PAUL, MN 55101-2130
TELEPHONE: (612) 296-9412

June 26, 1997

Michael Paulsen, Esquire
University of Minnesota Law School
229 19th Ave South
Minneapolis, MN 55455

Re: Peter Westendorp, et al. v. Bruce H. Johnson, Commissioner, et al.

Dear Michael:

In light of the recently decided *Agostini v. Felton* case, the Commissioner intends to no longer enforce Minn. R. 3525.1150 to prevent school districts from providing special education services on-site at sectarian schools and will take action to repeal the Rule to the extent it is inconsistent with *Agostini*. The State Defendants will be willing to enter into a stipulation for dismissal to this effect provided Plaintiffs waive any right to attorney's fees. Under the Rule, as well as

under the IDEA, the School Districts retain the discretion to determine whether they will provide direct special education services at private schools.

The State Defendants' position is that Plaintiffs' attorneys are not entitled to recover any attorney's fees in this matter. This litigation simply was not the catalyst for the change/non-enforcement in the Rule. The change in policy results from the Supreme Court overruling the precedent on which the Rule was premised. Plaintiffs cannot successfully assert that the State Defendants' conduct was the byproduct of this litigation and/or any favorable rulings by Judge Doty. To date, the only decision rendered by Judge Doty diminished Plaintiffs' claims against the State Defendants because it resulted in the dismissal of the IDEA claim, the dismissal of the organizational Plaintiff (which was the basis of the "on the face" challenge to the Rule) and the dismissal of the damage claim against the State Defendants. Further, Plaintiffs have taken only one deposition of a State witness. In fact, this witness testified that the Department of Children, Families and Learning does not enforce the Rule where there has been clear Supreme Court precedent to the contrary.

The State Defendants' position on attorney's fees is supported by *Shepard v. Sullivan*, 898 F.2d 1267 (7th Cir. 1990) (attorney's fees denied because change in governing law was basis for plaintiffs securing of

relief in obtaining social security benefits) and *Petrone v Secretary of Health and Human Services*, 936 F.2d 428 (9th Cir. 1991) (plaintiff whose victory stemmed from change in law cannot be characterized as a prevailing party). Finally, until and unless the School Districts elect to provide Plaintiffs with direct special education services at their private religious schools, Plaintiffs cannot even assert that they received the relief they sought from this litigation. Therefore, the Plaintiffs are not entitled to any attorney's fees from the State Defendants for this litigation.

On another note, we received your moving papers in support of Plaintiffs' Motion for a Preliminary Injunction earlier today. While we have not yet reviewed these documents, the State Defendants have absolutely no intention of paying any of your attorney's fees for drafting or other work associated with this Motion. In light of our June 22 [sic] letter to you in which we indicated that we were reviewing the *Agostini* decision and would contact you today after assessing its implications on this case, your drafting of the Motion and memorandum in support of a preliminary injunction was completely unwarranted.

Yours very truly,
/s/RACHEL L. KAPLAN
STEVEN B. LISS
Assistant Attorneys General
Education Division

cc: Scott Anderson, Esq.
Brain Maguire, Esq.
Daniel Bowles, Esq.
Daniel Kadlec, Esq.

Michael Stokes Paulsen
c/o University of Minnesota Law School
229 19th Ave S.
Minneapolis, MN 55455
(612) 625-0018

July 2, 1997

Steve Liss
Rachel Kaplan
Assistant Attorneys General
Office of the Attorney General
445 Minnesota St
St. Paul, MN 55101-2130
By Fax and U.S. Mail

Re: Peter v. Wedl, et al., No. 4-96-642

Dear Steve and Rachel:

Thank you for Rachel's letter of June 27 (dated June 26), responding to mine of Tuesday afternoon, June 24. Your letter was faxed to us after hours on Friday. I received it Monday. I apologize for the brief delay in responding.

We are, of course, delighted that the State Defendants have agreed no longer to enforce Rule 3525.1150 and to seek its repeal. This is the relief on the merits we

have sought (as to the State) all along. I have a few questions as to your proposal:

First, is your statement that the state defendants will no longer enforce Rule 3525.1150 and will seek its repeal intended as a counteroffer to my proposal of June 24, or do you view it as a unilateral concession? You asked us to join you in a stipulation of dismissal (with waiver of attorneys fees). Is our agreement to such a disposition a condition of the State's concession as to non enforcement of Rule 3525.1150, or is it a policy change the State Defendants are prepared to take whether we agree to such a stipulation or not?

Second, what exactly will be the form and content of the State's commitment not to enforce Rule 3525.1150? Will it track the substance of the first part of my proposal of June 24 - that is, that it will have the effect of "invalidating Rule 3525.1150 to the extent that it forbids provision of on-site special education services to children with disabilities attending private religious schools" (Paulsen Letter, June 24, 1997) - or do you mean something short of this when you say the State will not enforce the Rule "to the extent it is inconsistent with *Agostini*." We read *Agostini* as a complete acceptance of our position that Rule 3525.1150, or any other form of discrimination on the basis of religion in provision of on-site services, is not justified by the Establishment Clause, under the principles announced in *Zobrest*. Your previous position on *Zobrest*, however,

was that that case (and its principles) was limited to sign language interpreters. State Mem. Op. Prelim. Inj. (Aug. 26, 1996) at 14; State Mem. Op. Summ. J. (Oct. 28, 1996) at 8. I want to make sure that you are not taking and will not take a similar position with respect to the scope of *Agostini*, i.e., arguing that it is limited to Title I instructors. Only a complete commitment that the state will not enforce any rule, policy, or practice authorizing or requiring discrimination in provision of on-site special education services against children with disabilities attending private religious schools (as opposed to private non-religious schools) will fully satisfy plaintiffs' claims for relief. Are the state defendants prepared to make such a commitment, unhedged by any attempted narrow reading of *Agostini*? If so, I believe we are indeed very close to an agreed disposition of the merits as to the State Defendants. (Issues might still remain as to the School District defendants, of course.)

Third, again by way of assuring that all points are covered as to the merits, how will the State Defendants assure the repeal of Rule 3525.1150? Do the State Defendants have the authority to accomplish this result? When will it occur, and what form will it take? Does it require the concurrence of some other administrative body (like the State Board)? Will the State Defendants commit not to enforce any substituted or amended rule to the extent it discriminates, or authorizes discrimination, in the provision of on-site special education

services to children with disabilities attending private religious schools (as opposed to private non religious schools)? Will the State Defendants commit not to enforce, or themselves adopt, any other change in policy that would have the practical effect of denying plaintiffs the ability to obtain on-site special education services at private religious schools, or of making it impossible to obtain such relief against the School District defendants?

I hope you understand our concern here: If the State giveth with one hand but taketh away with the other (or blocks further relief against the School District defendants, in some other respect), the offer to decline to enforce Rule 3525.1150 is illusory. We are not saying that that is your intent. We just want to make sure that the State's offer fully satisfies plaintiffs' claims against the state defendants and eradicates all effects of the prior unconstitutional policy.

Fourth, I have some concerns with your somewhat cryptic statement that "the School Districts retain the discretion to determine whether they will provide direct special education services at private schools." Does this mean that the State will be taking a position of active opposition to plaintiffs' claims for relief against the defendant school districts, even though it will commit not to enforce Rule 3525.1150? If so, such a litigation posture would seem inconsistent with a claim that the State could be dismissed as a party, or that there remain

no continuing consequences of the State's prior position. I would appreciate clarification in this regard.

Moreover, based on Mr. Wayne Erickson's Rule 30(b)(6) testimony on behalf of the state defendants, it is clear that state law and policy (i) requires districts to provide special education to private school students; and (ii) requires on-premises services at private schools for such students, if the nature of a student's needs for services so dictates. In saying that "School Districts retain the discretion to determine whether they will provide direct special education services at private schools," I take it you are saying that they retain that discretion as a general matter, aside from the circumstances of a student whose needs have been determined to require on-site services (like paraprofessionals, as is the case in this litigation). Again, it is my hope that we are close to agreement on this point. Could you please clarify your position in this regard?

We understand your chagrin over our decision to serve a motion for preliminary injunction last week, based on discovery to date and *Agostini's* vindication of our legal position on the Establishment Clause issue. Based on your letter of June 27, however, and Mr. Anderson's letter of June 26 on behalf of the School District defendants, it is clear that the motion for preliminary injunction was and remains necessary in order to obtain the immediate relief the Westendorp family seeks.

Nonetheless, we remain hopeful that your answers to the inquiries in this letter may obviate the need for preliminary injunctive relief against the state defendants.

Our offer of June 24 remains open. As you know, the School District defendants have declined this offer. Letter of Scott Anderson, June 26, 1997. Mr. Anderson's letter, however, preceded your response to us of June 27 (misdated June 26), and the School District defendants may well reevaluate their position in light of the State's abandonment of Rule 3525.1150. In any event, we recognize that the State cannot force the school district defendants to settle. Accordingly, we modify our offer as follows:

If and when the State unequivocally commits to a position that would have the effect of granting plaintiffs all the relief they have sought against the State that the State is empowered to grant independently of the actions of defendant districts, we will immediately stop the meter running on any claim of attorneys fees against the State for merits litigation thereafter. This offer is contingent on satisfactory answers and commitments, in response to the questions posed above. (We understand your position that plaintiffs are not entitled to fees. We disagree, but this is not the appropriate occasion to pursue those points of disagreement. We may be able to work toward an agreed resolution of those issues, too, once the merits issues have been fully resolved.)

We look forward to your speedy reply. It is our hope that these remaining issues may be resolved promptly. In the meantime, we will continue with discovery and will continue to pursue all appropriate remedies on behalf of our clients.

Sincerely,

/s/Michael Stokes Paulsen
Counsel for Plaintiffs

cc Dan Bowles, Dan Kadlec, Eric Hawes (co-counsel for plaintiffs)
Scott Anderson, Brian Maguire (counsel for district defendants)
Westendorp family
Peter Family

Michael Stokes Paulsen
c/o University of Minnesota Law School
229 19th Ave S.
Minneapolis, MN 55455
(612) 625-0018

July 7, 1997

Rachel Kaplan
Steve Liss
Office of the Attorney General
445 Minnesota St.
St. Paul, MN 55101-2128
By Fax and US Mail

Re: Peter v. Wedl, No. 4-96-642

Dear Rachel and Steve:

Do you withdraw your pending discovery requests?

Sincerely,
/s/
Michael Stokes Paulsen

cc Dan Kadlec, Dan Bowles, Erik Hawes
Scott Anderson, Brian Maguire

A.G.'s Ofc. Bus. Reg. Fax: 612-296-7438 Jul 11 '97 13:56
STATE OF MINNESOTA
OFFICE OF THE ATTORNEY GENERAL

BUSINESS REGULATORY SECTION
SUITE 1200
445 MINNESOTA STREET
ST. PAUL, MN 55101-2130
TELEPHONE: (612) 296-9412

July 11, 1997

VIA FACSIMILE AND MAIL

Michael Paulsen, Esquire
University of Minnesota Law School
229 19th Ave South
Minneapolis, MN 55455

Re: Peter v. Carlson, et al.

Dear Michael:

This responds to your letter of July 2 and further clarifies the State Defendants' position relative to the impact of the *Agostini* decision on the State Rule at issue in this case.

The State Defendants believe that *Agostini* mandates reinterpretation of Minn. R. 3525.1150. Thus, the Rule will not be enforced to the extent it is used by school districts to deny direct special education services at private religious schools that are available at nonreligious private schools. In other words, the Commissioner of the Department of Children, Families and Learning will not enforce the Rule to prohibit special education services at religious schools if the district chooses to provide services at such sites. Further, the Commissioner will seek to modify the Rule to allow the provision of direct special education services at all private schools, religious and nonreligious. As stated in our June 27, 1997 letter to you, because this change in the Rule results from the *Agostini* decision rather than the instant litigation, the State Defendants maintain that Plaintiffs' attorneys are not entitled to recover attorneys' fees.

The State Defendants agree to initiate the rulemaking process and to work in good faith with the State Board of Education, the entity vested with rulemaking authority, to change the Rule as described above. This process will likely take several months. Neither the Commissioner nor the attorneys can dictate the outcome of the rulemaking process.

If the State Defendants and the Plaintiffs enter into a stipulation for dismissal regarding the non-enforcement/changes to the Rule, the State

Defendants will no longer be parties to this case. However, if State officials are called as witnesses, they will testify fully and honestly.

Throughout this litigation, the State has made clear its position relative to the location of services to private school students under the IDEA. The State prevailed on this issue before Judge Doty and does not intend to alter its position. In fact, the recent reauthorization of the IDEA reinforces the State's position on this issue. Thus, under the IDEA, school districts have considerable discretion to determine the nature and locale of the special education services. With the anticipated change in the Rule, the School Districts may provide such services at private religious schools, if they choose. The State, however, does not agree that a school district must provide direct special education services on a private school site. Further, the State has no opinion whether any specific services at a religious school might violate the Establishment clause. This, too, is an issue for school districts to determine. The State is concerned only with the effect of the Rule and has changed its policy accordingly.

In the hope of reducing further expenses and in light of the likely resolution of this matter under *Agostini*, the State Defendants will not be responding to your Motion in Support of a Preliminary Injunction or attending depositions, and we do not expect you to respond to our pending discovery requests.

Please let us know if we can reach an acceptable stipulation on the basis of this letter. Otherwise, the State will move to dismiss the claim as moot. -

Yours very truly,

/s/RACHEL L KAPLAN
STEVEN B. LISS
Assistant Attorneys General
Education Division

cc:Daniel Kadlec, Esq.
Daniel Bowles, Esq.
Scott Anderson, Esq.
Brian Maguire, Esq.
Erik Hawes, Esq.

Michael Stakes Paulsen
c/o University of Minnesota Law School
229 19th Ave. S.
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July 16, 1997

Steven B. Liss
Rachel Kaplan
Assistant Attorney's General
Office of the Attorney General
445 Minnesota St.
St. Paul, MN 55101-2130

By FAX and U.S. Mail

Re: Peter v. Wedl, Commissioner, et al., No. 4-96-642

Dear Steve and Rachel:

I believe that your letter of July 11, 1997 provides, in sufficient measure, the assurances plaintiffs require to be able to enter a stipulated dismissal of this suit, against the State Defendants only, on the ground of mootness. Your letter of July 11, 1997, combined with your earlier letter, appears to grant plaintiffs

essentially all of the declaratory and injunctive relief they have sought against the State Defendants.

There are two points, on which we would like further assurance: First, does the Commissioner (or the Attorney General) possess the lawful authority to commit the Department of Children, Families, and Learning not to enforce a regulation adopted by the State Board? When I first inquired of then-commissioner Johnson about this, in April and May of 1996, he had doubts on this score. I pressed the point in pre-litigation discussions with Tanja Kozicky, the Governor's legal counsel, in May and June of 1996, and inquired whether the Governor could direct that Rule 3525.1150 not be enforced. She too was uncertain. She eventually said that the Governor would not attempt to do so, and that we would need to file a lawsuit in order to get the Rule changed.

If the Attorney General's office assures us, in good faith, that the State Defendants indeed have the necessary authority to refuse to enforce this regulation, we will accept this as satisfactory. We would like such assurance in writing, preferably in the Stipulation of Dismissal. If you cannot give such assurance, then I believe that we should jointly ask the Court to put the State Defendants' pledge in the form of a declaratory judgment and permanent injunction.

Second, will you assure us that, aside from the decision not to enforce Rule 3525.1150 insofar as it forbids provision of on-site special education services at private religious schools, that the State Defendants have to date made no other policy change in state policy with respect to the obligations of school districts to provide special education services to children attending private schools? We are not asking you to pre-commit the State Board. We are just asking you to assure us that no other policy change has been made, or is intended to be made, by the State Defendants themselves, that would undermine the result accomplished by the decision to not enforce Rule 3525.1150. Again, I would not anticipate that this should be a problem.

While we are prepared to enter into a stipulation of dismissal (if the above reassurances are made), we do not agree that plaintiffs are not entitled to attorney's fees. I think that, for now, we should agree to disagree on this point. I have attached a proposed order which preserves the respective positions of both sides. My suggestion is that we ask the Court for sixty days from entry of any order of dismissal, to enable us to present case authorities to each other and negotiate with respect to the fee award issue. My expectation is that we can reach an acceptable compromise. If, at the end of the sixty day period, we have not reached agreement, we would ask the Court to establish a briefing schedule on the attorney's fees issue.

If we can agree on these remaining points, we would not expect a response to our motion for a preliminary injunction. At the time of the hearing on the motion, we would simply enter the stipulated dismissal on the record with Judge Doty. Please call me at your earliest convenience to discuss these points.

Sincerely,

/s/Michael Stokes Paulsen

Counsel for Plaintiffs

cc Dan Kadlec, Dan Bowles

[Proposed stipulation, attached to July 16, 1997 letter of Michael Paulsen]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
Civil Action No. 4-96-642
Judge David S. Doty

JOAN PETER, SARAH PETER, a minor with disabilities, by and through her parent and natural guardian Joan Peter, KRISTA WESTENDORP, DOUGLAS WESTENDORP, AARON WESTENDORP, a minor with disabilities, by and through his parents and natural guardians Krista Westendorp and Douglas Westendorp, and CHOICE IN EDUCATION FOUNDATION, INC.,

Plaintiffs,

vs.

ROBERT WEDL, Commissioner, Minnesota Department of Children, Families, and Learning, ARNE H. CARLSON, Governor, State of Minnesota, INDEPENDENT SCHOOL DISTRICT #877 (Buffalo, MN), and

INDEPENDENT SCHOOL DISTRICT #273)
(Edina, MN),

Defendants.

STIPULATION OP DISMISSAL

Come now the plaintiffs, by counsel Michael Stokes Paulsen, Daniel L. Bowles, Daniel T. Kadlec, and C. Erik Hawes and defendants ROBERT WEDL, Commissioner, and ARNE H. CARLSON, Governor, by counsel Steven Liss and Rachel Kaplan, and stipulate and agree as follows:

1. Defendants WEDL and CARLSON (hereinafter the "State Defendants") have announced that the Commissioner of the Department of Children, Families, & Learning will no longer enforce State Rule 3525.1150 to the extent that such Rule prohibits school districts from providing on-site special education and related services to students with disabilities attending private religious schools and will work in good faith to achieve the repeal of Rule 3525.1150. This position is set forth in letters from counsel for the State Defendants to counsel for Plaintiffs, dated June 26, 1997 and July 11, 1997 (copies attached as exhibits A and C to this Stipulation) and noted in letters from counsel for Plaintiffs to counsel for the State Defendants, dated July 2,

1997 and July 16, 1997 (copies attached as exhibits B and D to this Stipulation).

2. The State Defendants represent to the Court that they have lawful authority to decline to enforce Rule 3525.1150. The State Defendants further represent that they have at this time adopted no other change in state policy with respect to the obligations of school districts to provide special education and related services to children with disabilities attending private schools.

3. The parties stipulate that in consideration of the decision of the State Defendants that they will no longer enforce Rule 3525.1150, and of the assurances as to the State Defendants' authority not to enforce Rule 3525.1150, Plaintiffs' claims for declaratory and injunctive relief against the State Defendants are moot. The parties therefore stipulate that the State Defendants should be dismissed as parties to this action.

4. Plaintiffs and the State Defendants do not stipulate to any disposition concerning the issue of attorneys fees. The parties agree to use best efforts to resolve the issue of attorneys fees award through private negotiation among counsel to the parties, and attempt to reach a resolution of this issue by a date set by the Court. The parties stipulate and agree to the grant of a continuance until such time as this Court shall determine, to permit time for such negotiation and possible settlement of the

attorneys fees award issue. The parties respectfully ask the Court to set a date, sixty (60) days from the date of entry of this Order, for a "status conference" at which time a briefing schedule would be set concerning the attorneys fees issue, in the event the parties have not reached agreement.

Respectfully submitted,

Dated:

Michael Stokes Paulsen
pro hac vice
c/o University of Minnesota Law School
229 19th Ave. S.
Minneapolis, MN 55455
(612) 625-0018

Daniel L. Bowles (166522)
Daniel T. Kadlec (247583)
C. Erik Hawes (258301)
LARKIN, HOFFMAN, DALY & LINDGREN, Ltd.
7900 Xerxes Ave. S.
Bloomington, MN 55431-1194
(612) 835-3800
Counsel for Plaintiffs

Hubert H. Humphrey III
Attorney General
State of Minnesota

Rachel L. Kaplan (189984)
Steven B. Liss
(211266)
Assistant Attorneys General
445 Minnesota St.
St. Paul, MN 55101-2130

Counsel for State Defendants

[Proposed order, attached to July 16, 1997 letter of Michael Paulsen]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
Civil Action No. 4-96-642
Judge David S. Doty

JOAN PETER, SARAH PETER, a minor with disabilities, by and through her parent and natural guardian Joan Peter, KRISTA WESTENDORP, DOUGLAS WESTENDORP, AARON WESTENDORP, a minor with disabilities, by and through his parents and natural guardians Krista Westendorp and Douglas Westendorp, and CHOICE IN EDUCATION FOUNDATION, INC.,

Plaintiffs,

vs.

ROBERT WEDL, Commissioner, Minnesota Department of Children, Families, and Learning, ARNE H. CARLSON, Governor, State of Minnesota, INDEPENDENT SCHOOL DISTRICT #877 (Buffalo, MN), and

INDEPENDENT SCHOOL DISTRICT #273)
(Edina, MN),

Defendants.

ORDER

In accordance with the stipulation of Plaintiffs and Defendants ROBERT WEDL, Commissioner of the State Department of Children, Families, and Learning and ARNE CARLSON, Governor of the State of Minnesota ("State Defendants"), Plaintiffs claims for declaratory and injunctive relief against the State Defendants are hereby dismissed as moot.

A status conference is set for sixty days from this date of this Order to set a briefing schedule on the issue of attorneys fees, if the parties have reached no resolution prior to that date.

It is so ORDERED.

DAVID S. DOTY
United States District Judge

[Negotiated Stipulation executed and
filed on July 31, 1997]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
Civil Action No. 4-96-642
Judge David S. Doty

JOAN PETER, SARAH PETER, a minor)
with disabilities, by and through)
her parent and natural guardian)
Joan Peter, KRISTA WESTENDORP,)
DOUGLAS WESTENDORP, AARON)
WESTENDORP, a minor with)
disabilities, by and through his)
parents and natural guardians)
Krista Westendorp and Douglas)
Westendorp, and CHOICE)
IN EDUCATION FOUNDATION, INC.,)

Plaintiffs,

vs.

)
ROBERT WEDL, Commissioner,)
Minnesota Department of Children,)
Families, and Learning,)
ARNE H. CARLSON, Governor, State)
of Minnesota, INDEPENDENT SCHOOL)
DISTRICT #877 (Buffalo, MN), and)

INDEPENDENT SCHOOL DISTRICT #273)
(Edina, MN),

Defendants.

STIPULATION

Come now the Plaintiffs, by counsel Michael Stokes Paulsen, Daniel L. Bowles, Daniel T. Kadlec, and C. Erik Hawes and defendants Robert Wedl, Commissioner, and Arne H. Carlson, Governor, by counsel Steven Liss and Rachel Kaplan, and stipulate and agree as follows:

1. Plaintiffs brought this action against Defendants Wedl and Carlson (hereinafter the "State Defendants") alleging, inter alia, Minnesota Rule 3525. 1150 prevented the School District Defendants from providing special education services to the Plaintiffs at religious school sites.

2. State Defendants have stated that the Commissioner of the Department of Children, Families, and Learning will no longer enforce Minn. Rule 3525. 1150 to the extent that such Rule prohibits school districts from providing Plaintiffs on-site special education and related services attending private religious schools merely because of the religious nature of the school.

3. Further, State Defendants agree to work in good faith with the Minnesota Board of Education to achieve the amendment of Rule 3525. 1150, subpart 2, by striking the following sentence: "Special education services provided indirectly or directly to the pupil must be provided at a neutral site that is consistent with Minnesota Statutes, section 123.932, subdivision 9."

4. The State Defendants further represent that they have not at this time adopted and do not at the present time intend to adopt a change in state policy with respect to the obligations of school districts to provide special education and related services to children with disabilities attending private schools, other than the change described in paragraph 3.

5. Plaintiffs and the State Defendants agree to the entry of a preliminary injunction enjoining the Commissioner of Children, Families and Learning from enforcing Rule 3525.1150 to prohibit School District Defendants from providing Plaintiffs on-site special education and related services attending private religious schools merely because of the religious nature of the school. The injunction will remain in effect until further Order of the Court. The Plaintiffs' and the State Defendants' intent is that the injunction will continue until such time as the Minnesota Board of Education acts on (adopts, modifies, rejects) the proposed amendment to the Rule described in Paragraph 3. The

Plaintiffs and the State Defendants agree to promptly notify the Court once the Board acts.

6. Upon adoption by the Minnesota Board of Education of an amended rule as described in Paragraph 3, Plaintiffs' claims for permanent and injunctive relief against the State Defendants will become moot and Plaintiffs' claims against the State Defendants will be dismissed at that time.

7. Plaintiffs and the State Defendants do not stipulate to any disposition concerning the issue of attorneys fees. The State Defendants assert that their change in position regarding the Rule resulted from the United States' Supreme Court decision in *Agostini v. Felton* and not this lawsuit and that, therefore, Plaintiffs are not entitled to attorneys fees. Plaintiffs dispute the State Defendants' position and maintain that they are entitled to attorneys fees as prevailing parties in this action.

8. The parties stipulate and agree to the grant of a continuance, until such time as this Court shall determine, to enable them to discuss the attorneys fees award issue. The parties respectfully ask the Court to set a date, sixty (60) days from the date of entry of this Order, for a status conference at which time a briefing schedule would be set concerning the attorneys fees issue if this issue is not resolved at that time.

9. A joint proposed Order is attached.

Respectfully submitted,

Dated: 7/31/97

/s/Michael Stokes Paulsen
pro hac vice
c/o University of Minnesota Law School
229 19th Ave. S.
Minneapolis, MN 55455
(612) 625-0018

Daniel L. Bowles (166522)
Daniel T. Kadlec (247583)
C. Erik Hawes (258301)
LARKIN, HOFFMAN, DALY & LINDGREN, Ltd.
7900 Xerxes Ave. S.
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Counsel for Plaintiffs

Hubert H. Humphrey III
Attorney General
State of Minnesota

/s/Rachel L. Kaplan (189984)
Steven B. Liss (211266)
Assistant Attorneys General
445 Minnesota St.

St. Paul, MN 55101—2130
Counsel for State Defendants

[Proposed Order, attached to
Stipulation executed July 31, 1997]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
Civil Action No. 4-96-642
Judge David S. Doty

JOAN PETER. SARAH PETER, a minor)
with disabilities, by and through)
her parent and natural guardian)
Joan Peter, KRISTA WESTENDORP,)
DOUGLAS WESTENDORP, AARON)
WESTENDORP, a minor with)
disabilities, by and through his)
parents and natural guardians)
Krista Westendorp and Douglas)
Westendorp, and CHOICE)
IN EDUCATION FOUNDATION, INC.,)

Plaintiffs,

vs.

ROBERT WEDL. Commissioner,)
Minnesota Department of Children,)
Families, and Learning,)
ARNE H. CARLSON, Governor, State)
of Minnesota, INDEPENDENT SCHOOL)
DISTRICT #877 (Buffalo, MN), and)

INDEPENDENT SCHOOL DISTRICT #273)
(Edina, MN),

Defendants.

ORDER

In accordance with the Stipulation of Plaintiffs and Defendants ROBERT WEDL, Commissioner of the State Department of Children, Families, and Learning and ARNE CARLSON, Governor of the State of Minnesota ("State Defendants"), Plaintiffs' motion for a preliminary injunction against the State Defendants is hereby GRANTED. The State Defendants are hereby enjoined and restrained from enforcing Rule 3525.1150 insofar as it prohibits provision of special education services to Plaintiffs Sarah Peter and Aaron Westendorp on the premises of a private religious school.

This injunction shall continue until further order of this Court. The Plaintiffs and the State Defendants shall inform the Court when the Minnesota Board of Education has acted on the proposed amendment to the Rule described in paragraph 3 of the Stipulation. At that time, the parties will request dismissal of the action or modification of the injunction.

A status conference is set for sixty (60) days from the date of this Order to note the status of the Minnesota Board of Education's consideration of an amended rule and to set a briefing schedule on the issue of attorneys

fees as between Plaintiffs and the State Defendants, if Plaintiffs and the State Defendants have not reached agreement on that issue.
IT IS ORDERED.

DATED:

DAVID S. DOTY

United States District Judge

[Ordered signed, dated, and entered
August 5, 1997 by Judge David Doty]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
Civil Action No. 4-96-642
Judge David S. Doty

JOAN PETER, SARAH PETER, a minor with disabilities, by and through her parent and natural guardian Joan Peter, KRISTA WESTENDORP, DOUGLAS WESTENDORP, AARON WESTENDORP, a minor with disabilities, by and through his parents and natural guardians Krista Westendorp and Douglas Westendorp, and CHOICE IN EDUCATION FOUNDATION, INC.,

Plaintiffs,

vs.

ROBERT WEDL, Commissioner, Minnesota Department of Children, Families, and Learning, ARNE H. CARLSON, Governor, State of Minnesota, INDEPENDENT SCHOOL DISTRICT #877 (Buffalo, MN), and

INDEPENDENT SCHOOL DISTRICT #273)
(Edina, MN),

Defendants.

ORDER

In accordance with the Stipulation of Plaintiffs and Defendants ROBERT WEDL, Commissioner of the State Department of Children, Families, and Learning and ARNE CARLSON, Governor of the State of Minnesota ("State Defendants"), Plaintiffs' motion for a preliminary injunction against the State Defendants is hereby GRANTED. The State Defendants are hereby enjoined and restrained from enforcing Rule 3525.1150 insofar as it prohibits provision of special education services to Plaintiffs Sarah Peter and Aaron Westendorp on the premises of a private religious school.

This injunction shall continue until further order of this Court. The Plaintiffs and the State Defendants shall inform the Court when the Minnesota Board of Education has acted on the proposed amendment to the Rule described in paragraph 3 of the Stipulation. At that time, the parties will request dismissal of the action or modification of the injunction.

A status conference is set for sixty (60) days from the date of this Order to note the status of the

Minnesota Board of Education's consideration of an amended rule and to set a briefing schedule on the issue of attorneys fees as between Plaintiffs and the State Defendants, if Plaintiffs and the State Defendants have not reached agreement on that issue.

IT IS ORDERED.
DATED: 8/5/97

/s/DAVID S. DOTY

United States District Judge

[Settlement between the Peters and their school district, executed by the school district on August 28, 1997]

SETTLEMENT AND RELEASE OF CLAIMS

WHEREAS, Sarah Peter is a student with disabilities receiving special education and related services from Independent School District 877 (hereinafter, the School District); and

WHEREAS, Joan Peter, parent and natural guardian of Sarah Peter, has in the past requested that direct special education services be provided to Sarah Peter at a private sectarian school; and

WHEREAS, Minnesota State Board of Education Rule *3525.1150,* subp.2 forbade the delivery of direct, on-site special education and related services at private sectarian schools; and

WHEREAS, pursuant to the above-listed rule it was the policy and practice of the School District to refuse to provide direct on-site special education and related services at private sectarian schools; and

WHEREAS, Sarah Peter and Joan Peter initiated a lawsuit against the School District in August 1996 claiming that the actions of the School District constituted a violation of Sarah and Joan Peter's statutory and constitutional rights, including violations of

the Individuals with Disabilities Education Act and the First Amendment, and requesting as part of its relief that Sarah Peter receive special education and related services at a private sectarian school of her choice; and

WHEREAS, the State of Minnesota has indicated in July of 1997 that they would no longer enforce Minnesota Rule 3525.1150, subp. 2 insofar as it distinguished between private sectarian and private non-sectarian schools for purposes of determining the locations at which direct special education and related services could be provided; and

WHEREAS, the School District, given the change in the State's policy, may now change its earlier policies and practices with regard to the provision of direct special education and related services for Sarah Peter at private sectarian schools; and

WHEREAS, it is the desire of Sarah and Joan Peter and the School District to settle all disputes between them and any other matters arising out of Sarah Peter's educational program in the School District, and to avoid any further administrative or judicial proceedings between the parties; and

WHEREAS, it is the intent of the School District and Sarah and Joan Peter in entering a Settlement and Release Agreement that each of them will be precluded from in the future ever bringing any

claim, demand, or cause of action, of any nature whatsoever, against the School District, for any circumstances related to the Sarah Peter's educational program occurring before the date of this Settlement and Release, or related in any way to the provision or denial of special education and related services to Sarah Peter prior to the date of this Settlement and Release.

NOW, THEREFORE, in consideration of the foregoing, Sarah and Joan Peter and the School District agree as follows:

1. In consideration of the payment of $31,500 (Thirty One Thousand, Five Hundred Dollars), receipt of which is hereby acknowledged, and in consideration of the School District's agreement recited at paragraph three *(3)* herein, the undersigned Joan Peter, individually and as parent and natural guardian of Sarah Peter, hereby releases and forever discharges the School District, its Board members, administrators, employees, agents, assigns, volunteers, insurers, and any and all persons associated in interest with the School District, from any and all actions, causes of action, liability, claims, and demands whatsoever, that now exist or may hereafter exist, as a consequence of or by reason of any damage, loss, or injury, known or unknown, that has been sustained by Sarah and/or Joan Peter, in consequence of or in any *way* arising out of Sarah Peter's educational program and/or the provision of special education and related services to Sarah Peter

by the School District, up through and including the date of the execution of this Settlement and Release. Such losses or injuries shall include, but are not limited to, all claims for damages, attorneys' fees, and costs of pursuing Sarah and Joan Peter's claims against the School District.

2. The undersigned, Joan Peter, acting on her own behalf and on behalf of Sarah Peter, expressly understands and agrees that the agreement as recited herein is made in compromise of a disputed claim, and that it is not to be construed as an admission of liability by or on behalf of the School District, or any other party identified in interest therewith, by whom liability is expressly denied.

3. The School District agrees to rescind any policies or practices of the District that forbid provision of direct, on-site, full-time or substantially full-time, individualized, in-classroom services at private schools within the District. The School District expressly agrees that the School District shall provide direct, on-site, full-time or substantially full time, individualized, in-classroom, one-on-one services (including but not limited to paraprofessional services) to Sarah Peter at private schools within the district, including private religious schools, when to do so would not result in the loss of federal or state funded reimbursement, nor impose additional costs, other than de minimis costs and staff transportation costs, greater than the cost of

providing such services in the public school or other public education center. Provision of such services will only be considered if such services are requested by Sarah Peter's parent and if Sarah Peter's need for such services at a given placement is demonstrated in her Individualized Education Plan (IEP). If at the time an IEP is being formulated there is a question regarding the loss of federal or state reimbursement due to a provision of the IEP, the IEP team will seek appropriate guidance from the agency responsible for compliance.

4. It is expressly understood and agreed by the undersigned parties, that in executing this Release and Settlement there exists no promise or inducement except as set forth herein; and that this Release and Settlement is executed without any reliance upon any statement or representation by the party released, its representatives or agents, concerning the nature and extent of the damages sustained by the undersigned, or the legal liability therefore.

5. The undersigned hereby agree to enter into a Stipulation of Dismissal with prejudice regarding case 4-96-642, currently pending before Judge David Doty in the Federal District Court for the District of Minnesota, calling for an Order for a Judgment of Dismissal to be entered dismissing the complaint of Joan and Sarah Peter against the School District, with prejudice and without any costs, disbursements, or attorneys' fees on any party.

6. The terms of this Settlement and Release are contractual and not mere recitals, and as set forth constitute the entire agreement reached between the School District and Sarah and Joan Peter. Should any Provision of this Settlement and Release be held illegal or unenforceable, the remainder of this Agreement shall remain in force.

7. By signing this Settlement and Release, the undersigned acknowledge that they have read the Settlement and Release, understand and agree to the terms and implications of this agreement, and that they have been represented by legal counsel and have had a full opportunity to obtain such advice as necessary with respect to the settlement of this claim.

8. To the extent applicable, pursuant to Minnesota Statute § 363.03.1(2) this Release of all Claims is effective upon execution and it is nonrescindable.

THE UNDERSIGNED HAVE CAREFULLY READ THE FOREGOING SETTLEMENT AND RELEASE OF ALL CLAIMS AND FULLY UNDERSTANDS ALL TERMS.

Joan Peter, on her own behalf and as parent and natural guardian of Sarah Peter

Dated:Sept 14, 1997
/s/Joan Peter
/s/Witness

Buffalo Independent School District 877
Dated: 8/28/1997

By:/s/Sue Mackey
Its Chair, School Board District 877
/s/ witness

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543-0001

William K. Suter
Clerk of the Court

December 13, 1999

Mr. J. Matthew Szymanski
8280 Greensboro Drive
7th Floor
McLean, VA 22101-3807

Re: Sarah Peter, et al. v. Christine Jax, et al.
Application No. 99A491

Dear Mr. Szymanski:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Thomas who on December 13, 1999, extended the time to and including February 27, 2000.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk

By

/s/Sandra Elliott Spagnolo
Assistant Clerk

STATUTORY PROVISION INVOLVED

42 U.S.C. §1988(b) provides:

> In any action or proceeding to enforce a provision of sections ... 1983 ... of this title ..., the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Supreme Court, U.S.
FILED
MAR 29 2000
CLERK

(3)

No. 99-1428

In The

Supreme Court of the United States

AARON WESTENDORP, ET AL.,

Petitioners,

v.

JESSE VENTURA, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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43pp

QUESTIONS PRESENTED

1. WHETHER THE EIGHTH CIRCUIT PROPERLY CONCLUDED THAT THE DISTRICT COURT WAS NOT CLEARLY ERRONEOUS IN FINDING THAT THE STATE ACTED TO CHANGE ITS POLICY AS A RESULT OF A UNITED STATES SUPREME COURT DECISION AND NOT AS A RESULT OF THIS LITIGATION.

2. WHETHER THE EIGHTH CIRCUIT WAS CORRECT, AS A MATTER OF LAW, IN CONCLUDING THAT PETITIONERS ARE NOT PREVAILING PARTIES.

3. WHETHER THE EIGHTH CIRCUIT PROPERLY FOUND THAT THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING FEES BASED ON THE CONCLUSION THAT SPECIAL CIRCUMSTANCES MADE AN AWARD OF FEES UNJUST.

LIST OF PARTIES

Pursuant to Supreme Court Rule 14.1(b), the parties to this proceeding are:

Petitioners:

Joan Peter, Sarah Peter, a minor, by and through her parent and natural guardian Joan Peter; Krista Westendorp, Douglas Westendorp, and Aaron Westendorp, a minor by and through his parents and natural guardians Krista and Douglas Westendorp.

Respondents:

Christine Jax, Commissioner, Minnesota Department of Children, Families and Learning; Jesse Ventura, Governor, State of Minnesota.

The correct case caption for this matter is *Peter v. Jax*.

At the Eighth Circuit, the case caption for this matter is *Peter v. Jax*, 187 F.3d 829 (8th Cir. 1999). By changing the caption, Petitioners have created unnecessary confusion and erroneously implied a connection between this fees litigation (*Jax*) involving the State, and the school district merits litigation (*Westendorp v. I.S.D. # 273*, 35 F.Supp.2d 1134 (D. Minn. 1998)), where the State did not participate. Contrary to Petitioners' assertion, *Westendorp* is not the "merits decision" of this attorneys' fee matter. Because the State case was dismissed as moot, there is no merits decision in this case beyond the original district court decision. *See Peter v. Johnson*, 958 F.Supp. 1383 (D. Minn. 1997).

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, who were the State Defendants below, respectfully oppose Petitioners' petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

The attorneys' fee opinion of the Court of Appeals (Pet. App. at 1-30), for which certiorari review is sought, is *Peter v. Jax*, 187 F.3d 829 (8th Cir. 1999) (*reh'g denied; reh'g en banc denied; reconsideration denied*) (order entered pursuant to Fed. R. Civ. P. 54(b)). The attorneys' fee opinion of the district court (Pet. App. at 31-92) is *Peter v. Wedl*, 18 F.Supp.2d 1002 (D. Minn. 1998).[1] The opinion of the district court (a decision denying Petitioners' motion for injunction and for summary judgment) (Pet. App. at 149-206) is *Peter v. Johnson*, 958 F.Supp. 1383 (D. Minn. 1997). *Johnson* is the only merits decision to which these Respondents were parties.

Petitioners separately litigated several issues with one of two school district defendants. The State was not a party to the litigation. The opinion of the Court of Appeals addressing the school district litigation (Pet. App. at 107-148) is *Peter v. Wedl*, 155 F.3d 992 (8th Cir. 1998). The corresponding opinion of the district court after remand (Pet. App. at 93-106) is *Westendorp v. I.S.D. #273*, 35 F.Supp.2d 1134 (D. Minn. 1998).

STATEMENT OF THE CASE

On August 13, 1999, a unanimous panel of the Eighth Circuit affirmed the judgment of the district court

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[1] Robert Wedl and Bruce Johnson are former Commissioners of the Minnesota Department of Children, Families and Learning. Christine Jax, the current Commissioner, has since been substituted as the named defendant.

denying Petitioners' attorneys' fees request under 42 U.S.C. § 1988. Petitioners' counsel had sought $288,024 in fees, including over $75,000 incurred just to recover fees (not including any fees for the Eighth Circuit appeal). The Eighth Circuit held that Petitioners were not "prevailing parties" and, alternatively, even if they were, Petitioners were not entitled to fees because unique "special circumstances" made an award of fees unjust. Contrary to Petitioners' assertion, the court made no new law. Rather, the court affirmed the district court's factual findings as not clearly erroneous and applied the well-settled principles of *Farrar v. Hobby*, 506 U.S. 103 (1992) to those facts. On the alternative holding, the court found that the district court did not abuse its discretion, based on a multitude of factors, most of which are unchallenged by Petitioners. These intensely factual determinations and correct application of law do not merit review by this Court.

I. UNDERLYING LITIGATION

The facts of this case are set out in *Peter v. Jax*, 187 F.3d at 831-33 and 18 F.Supp.2d at 1002-1010 (Pet. App. at 7-12; 38-58). Although Petitioners direct the Court to the facts as discussed in *Peter v. Wedl*, 155 F.3d at 994-996 (Pet. App. at 114-119), Pet. at 3 (school district case), those "facts" have no relevance to this appeal. The State was neither a party nor involved in the appeal of the school district case. Because the issues and parties in *Peter v. Wedl*, 155 F.3d 992 (8th. Cir. 1998) (school district case) were different than those in *Peter v. Jax*, 18 F.Supp.2d 1002 (Pet. App. at 31) (attorneys' fees case), evidence relevant to the attorneys' fees issues was not part of the record in the school district case and critical arguments were not presented to the court. Furthermore,

Petitioners present multiple misstatements of fact, as well as mischaracterization of the opinions of the courts below. Therefore, Respondents provide the following full statement of the facts as found by the district court and affirmed by the court of appeals.

A. Original Cause Of Action

Petitioners Sarah Peter and Aaron Westendorp, as well as Choice in Education ("CIE"), sued two public school districts (Buffalo and Edina) and the State of Minnesota, seeking special education services at religious schools. They alleged that the denial of on-site services violated the Individuals with Disabilities in Education Act ("IDEA") 20 U.S.C. § 1400 *et seq.*; that the school districts discriminated against them based on religion; and that a State Rule required that discrimination.[2]

The State Rule at issue, Minn. R. 3525.1150, subp. 2 ("Rule"), is part of the State's funding mechanism under the IDEA. The State plays a limited role, relative to the school districts, in providing special education services under state and federal law. A student's public school district determines whether a student is eligible for special education services; a school district team, which includes teachers, parents and specialists, determines the appropriate program of services for the eligible student. *See* Minn. Stat. § 120.17, subd. 3a (implementing 34 C.F.R. Pt. 300); 34 C.F.R. § 300.121. If a parent chooses to send the student to a private school, religious or otherwise, the

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[2] Petitioners also brought a claim under the Religious Freedom Restoration Act ("RFRA"), which they dismissed after RFRA was declared unconstitutional. *See City of Boerne v. Flores*, 521 U.S. 507 (1997).

public school need not offer the same services to the student. 34 C.F.R. §§ 300.451-300.452. The school district must make services available on an equitable basis to private school students, but the location of the services is left to the school district's discretion. *See Peter v. Wedl*, 155 F.3d at 998 (Pet. App. at 27).

The State is responsible for establishing an overall plan to assure the federal government that special education services will be provided as required by federal law and provides approximately 40% of the costs of the program. The Rule then at issue paid state aid to public school districts for non-instructional special education services given at "neutral sites," such as public schools and nonsectarian private schools (*see* Minn. Stat. § 123.932, subd. 9). A school district would not have received state aid for services located at religious schools, but might have received aid for services at nonsectarian schools if otherwise permitted under the law.[3] However, contrary to the representation of Petitioners at 2, the Rule did not require that the services be provided at a nonsectarian, private school. In fact, the location of services was a matter of choice of the school district. Further, the Rule did not affect the students' ability to receive special education services. Thus, throughout the litigation, the school districts provided Peter and Westendorp the full range of special education services. The Rule, at most, may have influenced the school districts' choice of location of services.

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[3] As discussed below, on October 13, 1997, the Minnesota State Board of Education amended the Rule to include all private schools as possible sites for non-instructional services.

The lawsuit alleged that the Rule discriminated against individuals who chose to attend private religious schools because they were denied publicly provided services at religious school sites. On the merits of the claim, the State maintained that the Rule did not require school districts to discriminate and that, according to the school districts' sworn affidavits, the districts did not, in fact, discriminate. The school districts maintained that the denial of services on-site was based on longstanding school district polices of not providing on-site services to *any private school students*, regardless of whether they attended religious or nonsectarian private schools. Additionally, the State maintained that the Rule was constitutional as applied because the services at issue – in-class public school teacher aides – could not be provided at religious school sites under the United States Supreme Court decision in *Aguilar v. Felton*, 473 U.S. 402 (1985).[4]

B. Procedural History.

The case was filed in July 1996. Shortly thereafter, Petitioners sought an order requiring defendants to provide Peter and Westendorp with special education services at religious schools during the 1996-97 school year. This preliminary injunction was denied by the Honorable David S. Doty, Judge of Federal District Court, on August 6, 1996, as was a request for expedited consideration. The State and school district defendants moved to dismiss the action on various grounds and Peter and Westendorp sought summary judgment on their statutory claims

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[4] Overruled by *Agostini v. Felton*, 521 U.S. 203 (1997).

under the IDEA. The motions were argued on November 8, 1996.

The State and school district defendants sought to stay discovery and consequent expenses while the motions were pending. Because Petitioners' counsel refused to voluntarily delay discovery, defendants obtained a protective order to stay discovery. Thus, no discovery was conducted during the four months that the motion was pending.

C. Decision Of Judge Doty.

On March 26, 1997, the court dismissed plaintiffs' IDEA claim, thus eliminating their statutory claim for services at religious schools sites. *See Peter v. Johnson*, 958 F.Supp. 1383, 1400 (D. Minn. 1997) (Pet. App. at 149).[5] Further, the court dismissed all claims against the State for money damages. The court dismissed the organizational plaintiff (CIE), thereby limiting the action to the two individuals (Peter and Westendorp). *See id.* at 1391 (Pet. App. at 176). The court denied defendants' motions to dismiss the constitutional issues, finding that the pleadings on their face stated a cause of action. *See id.* at 1394 (Pet. App. at 185).

The court denied Petitioners' motion for injunctive relief, refusing to order defendants to provide on-site services at religious schools. The court concluded that, even if the Petitioners were to prevail on their constitutional and federal claims, the court would likely prohibit

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[5] *Rev'd in part sub nom., Peter v. Wedl*, 155 F.3d 992 (1998) (Pet. App. at 107-148).

on-site paraprofessional services to any student voluntarily attending any private school, religious or non-religious, thereby denying the Petitioners the relief they were seeking. *See id.* at 1401 (Pet. App. at 205).[6]

Contrary to the assertion of Petitioners' counsel, (Pet. App. at 16), the district court never ruled on the Establishment Clause defense because such a ruling was not required. Although the State asserted that defense on the IDEA claim, no ruling was needed because the court ruled the IDEA did not require the services.

D. Settlement Of Case Against The State.

On June 23, 1997, this Court decided *Agostini v. Felton*, 521 U.S. 203 (1997). *Agostini* specifically overruled *Aguilar*, holding that placing public school teachers on religious school sites does not per se violate the Constitution. 521 U.S. at 236. *The next day*, counsel for the State wrote to Petitioners' counsel to inform him that the Commissioner was reviewing the State Rule in light of *Agostini* and asked that no additional work be performed for *three days* pending that review. (Pet. App. at 210-211.) On the second day, June 26, 1997, Petitioners' counsel rushed to file a new injunction motion. Also on June 26, the State informed Petitioners' counsel that the Commissioner would not enforce the Rule against the school districts if the districts chose to provide Peter or Westendorp the services on site at a religious school and that the Commissioner would ask the State Board of Education to amend any portion of the Rule inconsistent with *Agostini*. (Pet. App. at 216.)

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[6] This conclusion was never reversed.

The State's position, set forth in a letter from the State's counsel on June 26, 1997, was reiterated in letters of July 11 (Pet. App. at 229) and July 22 (Resp. App. at 1). The State's decision about the Rule was made without condition and without regard to the litigation, other than to iterate that the case was now moot as to the State. At the time of the Commissioner's decision, the overall validity of the Rule was beyond the scope of the litigation. The only issue remaining in the litigation was the application of the Rule to the two individual appellants. The State's decision on the Rule did not guarantee services at religious schools to the two Petitioners; that determination was left to the school districts' discretion. The Petitioners and the State signed a stipulation on July 31, 1997, memorializing the State's position. (Pet. App. at 244.) On August 4, 1997, the district court adopted the parties' stipulation and issued an order as proposed by the parties. (Pet. App. at 250, 253.) The court did not review the merits of the claim in any way and made no finding that the State Rule violated the Constitution. The stipulated order did not require the State to change the Rule. The State Board of Education, which had sole authority to amend the Rule, was not a party to the litigation. The stipulated injunction merely maintained the status quo until the Board reviewed the Rule. On October 13, 1997, the State Board of Education formally changed the Rule to permit what *Agostini* allowed. The parties filed a stipulation dismissing the case as moot on September 22, 1998. (Resp. App. at 3.)

The stipulation specifically left open Petitioners' argument for attorneys' fees.

II. PETITIONERS' CONTINUING LITIGATION AGAINST THE SCHOOL DISTRICTS.

The change in the State's position did not guarantee that Sarah Peter or Aaron Westendorp would receive special educational services at a religious school. The location of these services remained a decision of the local school district.

A. Settlement With Sara Peter.

In Sarah Peter's case, the school district decided to provide the services at a religious school and settled her claim. (Pet. App. at 256.) The school district also paid Sarah Peter $1,000 and Petitioners' counsel $30,000. The settlement agreement noted that it was based in part on the State's announced change of policy in July 1997. It did not mention the injunction, which was entered in August 1997.

B. Litigation With Aaron Westendorp.

In Aaron Westendorp's case, the Edina School District continued to litigate. The School District, under its announced policy of not providing services on site at *any private school*, would not provide services to Aaron Westendorp at a religious school, so he continued his claim.

The districts' position was unaffected by the State's post-*Agostini* policy. On appeal, the Eighth Circuit reversed the district court's entry of summary judgment on behalf of the school district. *See Peter v. Wedl*, 155 F.3d 992 (8th Cir. 1998) (Pet. App. at 107) ("*Westendorp*

Appeal").[7] The circuit court held that, under the amended IDEA, effective June 4, 1997, the school district had no ongoing obligation to provide services at private schools sites; however, the school district (not the State) improperly denied services to Westendorp at his private school before that date. Westendorp was awarded $1 in damages and, on remand, the court ordered special education services at a religious school site, as equitable relief for the past violation of IDEA. Petitioners have a pending attorneys' fees claim against the Edina School District, which includes over $67,000 in fees for its appeal.

The court did not rule that the district discriminated on the basis of religion. Rather, the court ordered a trial on the religious discrimination issue as a question of fact. That matter was left to the district court on remand, which did not decide the issue because Westendorp received full relief under his federal statutory claim.

III. ATTORNEYS' FEE LITIGATION.

After the stipulation with the State was entered, the State and Petitioners discussed attorneys' fees. Because the parties could not settle the issue, the matter was

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[7] The State was not a party to the *Westendorp Appeal*. Arguments and facts critical to understanding the effect of the Rule were not presented to the court. In the fee-litigation involving the State, the State provided the district court with evidence not presented to the Court of Appeals in the *Westendorp Appeal*. Any criticism in the *Westendorp* case was directed at the school district, not the State. Thus, reliance on any dicta in *Westendorp* is unfair to the State, as well as irrelevant to the petition. Significantly, the *Jax* panel included two judges from the *Westendorp* panel; these judges were part of the unanimous opinion affirming the denial of attorneys' fees.

presented to Magistrate Judge John M. Mason. Petitioners were seeking over $210,000 for the merits litigation and $75,000 for the time spent litigating fees.

A. Decision Of District Court Magistrate Judge Mason.

Judge Mason issued his order denying fees on August 12, 1998. *See Peter v. Wedl*, 18 F.Supp.2d 1002 (D. Minn. 1998) (Pet. App. at 31). In reaching his decision, Judge Mason reviewed the extensive submissions of the Petitioners:

> We are satisfied that the substantial submissions by the parties were sufficient and complete. "A request for attorney's fees should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). *See also Associated Builders v. Orleans Parish*, 919 F.2d 374 at 377, 378 (5th Cir. 1990). Plaintiffs were permitted to submit Memoranda in support of their Motion which exceeded page limitations. In addition, their Memoranda contained lengthy single space footnotes, and incorporated by reference many other materials, including more than 75 pages of single spaced correspondence containing legal argument. Plaintiffs' supporting materials included three three-ring binders filled with Affidavits and Exhibits, supplemented by additional Affidavits filed with their Reply. A summary of the contents of the three-ring binders is in the form of a nine page "Annotated Exhibit List to Fee Application." This Court denied Defendants' Motion to strike Plaintiffs' filings, and fully considered all of the materials submitted.

Peter v. Wedl, 18 F.Supp.2d at 1010 (Pet. App. at 57).

Based on his comprehensive review of this substantial record, Judge Mason issued a 37-page opinion, with detailed factual review and findings. *Id.* at 1004-10 (Pet. App. at 38-55). The court reviewed the case chronology, especially the actions of the State before and after the *Agostini* decision: "The chronology supports the conclusion that the [State's] action . . . was taken as a result of the decision of the Supreme Court in *Agostini*, and not as a result of Plaintiffs' lawsuit." *Id.* at 1017 (Pet. App. at 78). Looking at the entire record, the court rejected the idea that the discovery against the State – the single deposition taken by Petitioners in the case against the State – or the Petitioners' precipitous injunction motion had any effect on the State in changing its policy. *See id.* at 1017-18 (Pet. App. at 80).

Based on this intensely factual inquiry, the court determined that there was no causal link between the lawsuit and the State's decision to provide funding for services at religious schools under Minn. R. 3525.1150, subp. 2. *See id.* at 1016 (Pet. App. at 75). The court concluded that Petitioners were not prevailing parties and, therefore, not eligible for fees. *See id.* at 1017 (Pet. App. at 78). As separate and independent grounds for denying fees, the court concluded that special circumstances made an award of fees unjust in this case. *See id.* at 1018 (Pet. App. at 83).

B. Decision Of Eighth Circuit Court Of Appeals.

1. Petitioners are not prevailing parties.

The primary holding below was that Petitioners were not prevailing parties under 42 U.S.C. § 1988. In reaching

this conclusion, the court applied the correct legal standard for determining "prevailing party" status under *Farrar v. Hobby*, 506 U.S. 103 (1992). (Pet. App. at 12-13.) Applying *Farrar*, the court required Petitioners to show that the relief obtained in this case "materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." (Pet. App. 13.) The circuit court here rejected Petitioners' claim that the mere presence of the temporary consent injunction and stipulation automatically made them prevailing parties. *Id. See Rhodes v. Stewart*, 488 U.S. 1, 3 (1988) (declaratory judgment does not automatically make plaintiff prevailing party).

The court affirmed the finding that, because of *Agostini*, after June 26, 1997, the Commissioner no longer considered the religious/nonreligious nature of the site of service in providing state aid to public schools. The stipulation merely reiterated this change in policy, which was already in effect. The stipulation and injunction did not require any change in the State Rule; the State Board of Education was not a party and not subject to the injunction. Further, the stipulation and injunction did not require the State or any other party to provide services to either Petitioner. The injunction was not a consent judgment nor did it create a permanent injunction; rather, the injunction lasted until the State Board of Education, which was not subject to the injunction, considered changes to the Rule. Because the Board modified the Rule for reasons unrelated to this lawsuit, the claims became moot and the case was dismissed. Under these facts, which the circuit court found to be not clearly erroneous, the court concluded that the litigation did not cause the State to change its policy and that neither the stipulation

nor the temporary injunction materially altered the legal relationship between the State and the Petitioners nor caused any change in the State's behavior towards Petitioners.[8] Thus, Petitioners were not "prevailing parties" under the law.

2. Special circumstances justified denial of fees.

The court held that even if Petitioners prevailed, the district court did not abuse its discretion in denying fees because of "special circumstances." The court acknowledged that prevailing parties "should ordinarily recover an attorney's fees" and that denial for special circumstances should be narrowly construed. (Pet. App. at 23.) The court noted that "the defendant's good faith alone is not a special circumstance sufficient to justify a denial of fees." *Id.* The court concluded, however, that several factors, taken together, amounted to special circumstances making an award of fees unjust.

First, the court considered that, until *Agostini*, the State had a constitutional duty to follow *Aguilar.* Just like a court, the Commissioner must follow Supreme Court precedent until it is overturned. (Pet. App. at 24.) The

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[8] The State also argued that the stipulation and injunction did not directly benefit either Petitioner: (1) Westendorp received no relief until the court ordered Edina to provide services, 18 months after the Rule change and six months after the case against the State was dismissed; (2) Peter's relief was based on the policy change that occurred before the stipulation was entered. *Farrar, supra,* 506 U.S. at 111 (relief "must directly benefit [plaintiff] at the time of the judgment or settlement"). The panel did not decide the issue, but indicated support for the State's position. (Pet. App. at 30, fn. 7) (This issue would have to be decided on remand if the Court were to grant review and reverse the judgment.)

Commissioner also had a legal duty to enforce the State Rule until it was changed, if there was a constitutional basis for the Rule.[9] This is not an "intervening favorable caselaw" exception as Petitioners contend. Rather, this is a unique circumstance, where the Supreme Court reverses the long-standing precedent that formed the premise of the State Rule. Further, the *Jax* opinion does not rely on this factor alone, but considers it in combination with the remaining factors.

Next, the court considered the conduct of Petitioners' counsel in "running up the meter." (Pet. App. at 24-25.) The court did not in fact hold that counsel should not vigorously pursue meritorious claims in violation of ethical standards. Rather, the court considered the claim for fees and concluded that counsel had exceeded normal standards of advocacy. By March 26, 1997, when the district court lifted the stay of discovery, counsel knew that *Agostini* was forthcoming, well before the start of the school year; yet counsel claims $50,000 on the merits for the period between the Supreme Court argument in *Agostini* and the *Agostini* decision.[10] More remarkably, counsel claims over $50,000 in the five weeks between the *Agostini* decision and the date of the stipulation. *Jax* noted that the State asked for a three-day hiatus following *Agostini*. Rather than waiting, Petitioners filed a new motion based on *Agostini* within two days. The court further found that Petitioners used the prospect of additional fees to make more demands and offered to "stop

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[9] Petitioners never approached the Board seeking to change the Rule.

[10] Having conducted one deposition against the State during that period.

the meter on fees" only if the State agreed to their unreasonable demands. (Pet. App. at 26.) Denying the requested fees, the court concluded that a party "is not entitled needlessly to accumulate exorbitant legal fees . . . ." (*Id.*)

The court also made special note of the fact that Petitioners hired a self-described "fee-litigation specialist," who was claiming $75,000 just to litigate the fee recovery, plus fees for the appeal if successful. (Pet. App. at 26.) The court concluded that these fees were excessive and that Petitioners had ignored this Court's admonition that "a request for attorney's fees should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

Finally, the court noted that special circumstances existed because the State reasonably believed its action was compelled by law and that another defendant, with a much more direct connection to any constitutional violations, could fully compensate Petitioners for attorneys' fees. (Pet. App. at 27-30.) (relying on *Rose v. State of Nebraska*, 748 F.2d 1258, 1264 (9th Cir. 1984), *cert. denied*, 474 U.S. 817 (1985)); *see also Little Rock Sch. Dist. v. Arkansas State Board of Educ.*, 928 F.2d 248 (8th Cir. 1991) (fees denied because plaintiffs "well compensated" by fees from other parties). This is consistent with caselaw that apportioning fee liability is a matter of discretion with the district court – whether a defendant is jointly and severally liable, proportionally liable, or excused from liability.

The court concluded that the school districts had primary responsibility for any violation of special education law or the Constitution. Consistent with *Wedl*, the *Jax* Court concluded that the school district – not the State –

failed to provide the required services, which was the relief Petitioners sought. This relief was independent of the State Rule, as demonstrated by the litigation between Aaron Westendorp and Edina, which continued for almost two years after the State changed its Rule. In the end, the relief provided by Edina on the IDEA claim "provided all the relief they have sought in this case." Without dispute, the two school districts are capable of providing a fully compensatory fee.[11] The Court noted that Petitioners already received $30,000 from the Buffalo School District and that a petition for attorneys' fees against Edina is pending in district court.

Thus, the Eighth Circuit thoroughly examined the extensive factual record and concluded that the district court had not abused its discretion in holding that a number of factors, taken together, amounted to special circumstances making an award of fees unjust. In sum, these factors included: (1) the State's duty to follow long-standing Supreme Court precedent until it was reversed; (2) Petitioners' counsel "running up the meter," exceeding normal standards of advocacy; (3) Petitioners' offering to "stop the meter on fees" only if the State agreed to unreasonable demands; (4) Petitioners' use of a self-described "fee-litigation specialist," spawning a second major litigation over fees; and (5) the presence of another defendant with a much more direct connection to any constitutional violation who could fully compensate Petitioners. This alternative holding is especially unique to

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[11] The pending fee petition against Edina includes a request for over $67,000 for the *Wedl* appeal, as well as fees against Edina for the same district court action in which they were claiming fees against the State.

the facts of this case and provides an independent basis for denying fees. This decision does not create an "intervening favorable caselaw" exception to 42 U.S.C. § 1988 or any conflict with a lawyer's duty under the Rules of Professional Responsibility. The Eighth Circuit decision, based on a careful review of the record, does not merit Supreme Court review.

REASONS FOR DENYING THE PETITION

There is no reason for the Court to grant review in this case. The petition should be denied because (1) the case does not create an "intervening favorable" caselaw exception to Section 1988; (2) the circuit court applied the correct legal standard under *Farrar* to the facts; and (3) the case does not meet the high standards required for Supreme Court review. The case involves an intensely factual inquiry and correctly applies well-settled law to those facts. Further, the decision is not in conflict, direct or otherwise, with prior decisions of the Supreme Court or other circuits. Thus, the petition should be denied.

I. THERE IS NO INCONSISTENCY AMONG THE CIRCUITS.

Petitioners cite various cases to argue inconsistency among the circuits. As shown below, the cases do not support Petitioners' position and, in fact, demonstrate that different decisions in the circuits are due to the different facts in the cases. Consistently, the circuits look to the specific facts in deciding these fee cases.

A. The Eighth Circuit's Decision Is Consistent With The Fifth Circuit's Decision In *Associated Builders.*

Like the Eighth Circuit, the Fifth Circuit, in *Associated Builders & Contractors v. Orleans Parish School Board*, 919 F.2d 374 (5th Cir. 1990), examined the facts to determine whether plaintiffs were prevailing parties. The most impressive fact noted by the Fifth Circuit was the defendants' *admission* that the challenged program was changed because of the litigation:

> [T]he school board's own resolution provided a convincing admission that the litigation played a role on prompting the repeal of the program: "[I]t is in the best interest of Orleans Parish School Board to repeal the existing program . . . in light of pending litigation. . . . "

Associated Builders, 919 F.2d 374 at 378. Furthermore, the Fifth Circuit repeatedly noted that the chronology was key to its holding:

> The district court found the lawsuit was a substantial factor in the school board's decision to repeal its set-aside program. The court correctly considered the chronology of events and explained its reasoning. (Citations omitted.) *Id.* at 378.
>
> As we have previously observed, the chronology of events is an important consideration. . . . (Citations omitted.) *Id.*
>
> In deciding whether the litigation was a significant catalyst in prompting the board's action, the district court conducted an "intensely factual" inquiry. (Emphasis in original, citations omitted.) We cannot set aside its conclusion unless the evidence leaves us with the firm conclusion that the court has made a mistake. (Citations omitted.) In light of the court's careful

> analysis of the chronology of events and the board's admission that the lawsuit influenced its conduct, the conclusion is not clearly erroneous. *Id.*

Similarly, in the present matter, the Eighth Circuit relied on the district court's chronology:

> In this case, the district court's finding that the State changed its position on enforcement of the rule because of *Agostini*, and not because of appellants' lawsuit, is supported by the record and not clearly erroneous.

Jax, 187 F.3d at 834 (Pet. App. at 16).

> The chronology amply supports the district court's finding that it was *Agostini*, not the litigation, that caused the State to change its position on enforcement of the rule.

Id. at 835 (Pet. App. at 16).

Thus, the Eighth and Fifth Circuits applied the same legal principles, and both affirmed the respective factual findings of the district court as not clearly erroneous. The courts reached different results only because they applied the principles to different sets of facts and findings.

B. The Eighth Circuit's Decision Is Consistent With The Sixth Circuit's Decisions In *Perket* And *Putnam*.

The Sixth Circuit's decision in *Perket v. Secretary, Health and Human Services*, 905 F.2d 129 (6th Cir. 1990) was also closely tied to unique facts. While *Perket* was pending, the Sixth Circuit established controlling caselaw favoring the plaintiff (*Haynes v. Secretary of Health and Human Services*, 734 F.2d 284 (6th Cir. 1984)). The *Perket* plaintiff moved for summary judgment under *Haynes*. Rather than following the controlling caselaw, the *Perket*

defendants ignored the new law and brought a cross motion for summary judgment. While the cross motion was pending, Congress passed a law largely consistent with the Sixth Circuit's controlling precedent. Then and only then did the *Perket* defendants change their position. On review the Sixth Circuit noted: " . . . the Secretary's non-acquiescence to this court's holding in *Haynes* figured critically in the district court's award of attorney's fees to Perket." *Perket*, 905 F.2d at 131. Here, Respondents immediately changed policy consistent with the new law. As noted above, that change did not provide Petitioners the relief they sought.[12] *See* discussion *supra* at 9-10.

Petitioners also cite *Putnam v. Davies*, 960 F.Supp. 1268 (S.D. Ohio 1997), *aff'd*, 149 F.3d 1184 (6th Cir. 1998) (*op. unpub.*) to show that the Sixth Circuit rejects the argument that an intervening decision deprives a plaintiff of prevailing party status under Section 1988. *Putnam* does not support Petitioners' argument. The intervening decision in *Putnam*, an Ohio Supreme Court ruling that a particular state statute was unconstitutional, was not binding on the federal district court looking at a related, but *different*, statute. The federal court could have reached a contrary result on the specific statute contested before it. Therefore, it was not an intervening decision that

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[12] This case is also distinguishable under the so-called inevitability theory. In *Perket*, the court concluded that, because there were no facts to support the decision denying disability benefits, it was inevitable that Perket would prevail. *Perket*, 905 F.2d at 133. Here, Petitioners' prevailing status was not "inevitable." *See KDM v. Reedsport Sch. Dist.*, 196 F.3d 1046 (9th Cir. 1999) (failure to provide services on site at religious school does not deny free exercise rights or equal protection of students). *See also* discussion *infra* at 22 n.13, 26-28.

conveyed prevailing party status upon the *Putnam* plaintiff; rather, the prevailing party status was a result of the federal district court's ruling in *Putnam* itself that the statute challenged in federal court was unconstitutional. In contrast, neither the Eighth Circuit nor the district court in the present matter ever ruled on the constitutionality of the underlying State Rule.[13]

More importantly, *Jax* does not hold that an intervening favorable decision deprives a party of prevailing party status. Rather, the court considered the effect of *Agostini* on the conduct of the defendants. The court considered the entire record and rejected the assertion that the State was using the "cover" of *Agostini* to avoid attorney fee liability. Instead, the court found that, in this case, the facts established that the defendants changed their conduct as a result of the decision and *not* as a result of the litigation and entered a consent order that temporarily maintained the status quo. On these facts, Petitioners did not establish prevailing party status under *Farrar*.

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[13] Further, to the extent Sixth Circuit created an alternative "inevitability theory," the instant case is not the vehicle for resolving any possible conflict among the circuits. *Compare Guglietti v. Secretary of Health and Human Services*, 900 F.2d 397, 402-03 (lst Cir. 1990) (rejecting theory as spawning major hypothetical relitigation of cases in fee dispute). In the instant case, there was no finding of inevitability and such a determination would require significant litigation of constitutional and factual issues, which the remand in the *Westendorp Appeal* showed, are unnecessary for Petitioners to obtain full relief.

C. The Eighth Circuit's Decision Is Consistent With Arkansas Community Organization (ACORN).

The *Jax* decision is consistent with *ACORN's* conclusion that "good faith" does not justify denial of fees despite the unsettled state of the law in the area. Pet. at 24. *See Arkansas Community Organization for Reform Now v. State Bd. of Optometry*, 468 F.Supp. 1254, 1257 (E.D. Ark. 1979) (three-judge court). Both the circuit and district courts in *Jax* acknowledged that the "good faith" of the defendants may not be used to deny an award of attorneys' fees. (Pet. App. at 23, 88.) Instead, the Eighth Circuit examined the totality of the facts to support its holding of special circumstances. The Court listed five separate factual bases (including duty to follow Supreme Court precedent) that, when taken together, justified the denial of fees. *See Jax*, 187 F.3d at 837, 839 (Pet. App. at 23-30). Thus, the Eighth Circuit itself found no conflict.[14]

A recent decision in the Eighth Circuit demonstrates that the circuit is not creating a good faith exception to Section 1988 liability. One month after *Jax*, while the *Jax* petition for rehearing was pending, the court decided *Carhart v. Stenberg*, 192 F.3d 1142 (8th Cir. 1999). In affirming an award of fees, *Carhart* stated that a defendant's good faith belief that its action was constitutional is not in itself a special circumstance justifying a denial of fees. The panel in *Jax* operated on the same premise. 187 F.3d at 837. *Carhart* concluded that the district court did not

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[14] *ACORN* also can be distinguished on a key fact. ACORN was a prevailing party because the court declared the statute at issue unconstitutional. In contrast, Petitioners sought to have the State rule declared unconstitutional but never obtained such a decision.

abuse its discretion in holding a particular defendant liable for fees. Likewise, *Jax* concluded that the district court did not abuse its discretion, in part because defendant school districts had primary responsibility for any violation of special education law or the Constitution and are capable of providing a fully compensatory fee. Thus, *Jax* and *Carhart* applied the same legal principles – discretion to apportion liability – but reached different results as they applied the principles to different sets of facts.

D. *Laidlaw* Has No Effect On The Outcome Of This Case.

Citing *Friends of the Earth v. Laidlaw Environmental Services*, ___ U.S. ___, 120 S.Ct. 693, 711-12 (2000), Petitioners assert that the "catalyst" theory of attorney fee entitlement under 42 U.S.C. § 1988 may not remain viable following *Farrar v. Hobby*, 506 U.S. 103 (1992). Regardless, *Jax* does not conflict with *Laidlaw*, because the Eighth Circuit applied *Farrar*, not the catalyst theory. *Laidlaw* in fact neither expressly endorsed nor repudiated the continuing validity of the catalyst theory. 120 S.Ct. at 711. Thus, there is no need for Supreme Court action here.

Furthermore, the court should not take this case to address the viability of the catalyst theory because the result will not change, whether the theory remains viable or not. If the catalyst theory no longer exists, the State prevails under *Farrar*. Likewise, if the catalyst theory remains viable, the State will still win because of the "causation" finding of the courts below and because of the "special circumstances" findings of the district court, which the Eighth Circuit found to be supported by the evidence and not an abuse of discretion. In either case, the State will prevail.

E. Harmony, Not Cacophony, In The Circuits.

The lower courts are not in conflict over the effect of intervening favorable precedent on a plaintiff's status as a prevailing party under the fees statute. As demonstrated, *supra*, any differing results in the cases cited by Petitioners are due to application of the law to different underlying facts. Most importantly, this case does not hold that an intervening favorable precedent deprives Petitioners of prevailing party status. There is no conflict that merits attention by this Court and the Petition for Writ of Certiorari should be denied.

II. The *Harper* Retroactivity Analysis Has No Relevance To This Case.

Petitioners assert that the Eighth Circuit's holding directly conflicts with this Court's retroactivity analysis in *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993). Pet. at 14. This argument is a red herring.

The Eighth Circuit's decision here does not implicate *Harper*. *Harper* held:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review as to all events, regardless of whether such events predate or postdate our announcement of the rule.

509 U.S. at 98. The relevant rule of federal law here under discussion is the holding in *Agostini v. Felton*, 521 U.S. 203 (1997), overruling *Aguilar v. Felton*, 473 U.S. 402 (1985). There is no question that the lower courts in the present

case applied *Agostini* retroactively. Applying *Agostini* retroactively, however, does not create entitlement to attorneys' fees for Petitioners.

Agostini is not an attorneys' fees case and, therefore, has no effect on the legal standards for considering fee claims. Petitioners, however, attempt to use *Agostini* through *Harper* as a back door to establish entitlement to fees under the "inevitability of victory" theory. Petitioners argue, in effect, that if there is intervening favorable caselaw, they are automatically entitled to fees regardless of whether they meet the standards for fees under *Farrar*.[15] This Court has never articulated such a theory and, as previously argued, this is not the case to consider a such major expansion of attorney fee liability. *See supra* at 21 n.12, 22 n.13.

Even if *Harper* has any relevance, retroactive application of *Agostini* does not resolve the merits of Petitioners' claim for attorneys' fees. As Petitioners concede:

> *Agostini* did not involve any affirmative action claim under the Free Speech or Free Exercise clauses challenging denial of services to children attending religious schools. The only question decided was whether the Establishment Clause required denial of such services.

Pet. at 7.

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[15] The questions of whether *Agostini* "changed the law" is not relevant to the fee decision. The circuit court did not use this "change in law" to deny fees as a matter of law. Rather, the court considered the State's position in light of *Agostini* as a factual matter in determining the impact of this litigation on the conduct of the State and as a special circumstance in apportioning liability relative to the two school district defendants.

Agostini decided only that the First Amendment Establishment Clause did not per se preclude placing publicly-paid teachers on religious school sites. *Agostini* did not, however, address the Petitioners' central claims – whether the State and its public school districts were constitutionality *required* under the First Amendment Free Exercise Clause to provide publicly-paid teachers at their religious schools. Further, *Agostini* did not decide the unresolved factual issue of whether the Rule caused the school districts to deny services to the Petitioners. The State amended its Rule to provide funding to districts that took advantage of the ruling in *Agostini;* that change did not address the Petitioners' constitutional claim, nor did it require the school districts to provide publicly-paid teachers at the Petitioners' religious schools.

The constitutionality of the underlying State Rule in *Jax* has never been decided.[16] The only issue for the court

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[16] Petitioners misrepresent the case below, in stating:

> Petitioners' § 1983 suit challenged state conduct as not being in conformity with the correct understanding of the Constitution. Petitioners' claims on the merits were sustained in this regard, first by the District Court (as against a motion to dismiss), 958 F.Supp. at 1394-95 (Pet. App. at 186-87), and then by the Eighth Circuit. 155 F.3d at 996-998 (Pet. App. at 120-26). Petitioners defeated the State's defense of its rule and obtained an injunction against its enforcement. In short, Petitioners *won*. That is all that matters.

Pet. at 16 (emphasis in original). Petitioners never in fact "defeated" the State's defense. The constitutionality of the State's rule has never been decided, pre- or post-*Agostini*. Petitioners' claims were hardly "sustained" by surviving a motion to dismiss, which was not based on consideration of the constitutionality of the Rule. Moreover, the Eighth Circuit

in *Jax* was whether Petitioners were entitled to attorneys' fees based on the factual record in this case. As previously discussed, the circuit court correctly applied the *Farrar* standards to determine that Petitioners were not prevailing parties.

Moreover, the Eighth Circuit held against Petitioners' demand for attorneys' fees on a second, independent basis. Even if Petitioners were prevailing parties, the totality of the circumstances – the court enumerated five – justified the denial of attorneys' fees. *Jax*, 187 F.3d at 837-839 (Pet. App. at 23-30). The bulk of the "special circumstances" relates directly to the actions of Petitioners' counsel in conducting this litigation, as well as to the availability and culpability of two other defendants. This is an independent justification for affirming the denial of attorneys' fees.

III. The Eighth Circuit's Opinion Does Not Conflict With Ethical Rules And Professional Responsibilities Binding On Attorneys In 42 U.S.C. § 1983 Litigation.

The circuit court did not hold that counsel should not vigorously pursue meritorious claims in violation of ethical standards. Rather, as previously discussed, the court concluded that counsel exceeded normal standards of advocacy. *See supra* at 14-16. Counsel used the *Agostini* decision to accumulate over $50,000 for the five-week

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"merits" decision Petitioners cite for proof that they won is, in fact, dicta in their case against the Edina school district *to which the State was not a party*. In addition, as discussed *supra*, the State Rule was only the funding mechanism; it did not require denial of services. The school districts decided where services would be provided.

period after State determined it would no longer enforce the State Rule; counsel increased its demands and offered to "stop the meter on fees" only if the State agreed to its unreasonable demands. *Jax*, 197 F.3d at 838 (Pet. App. at 26); and counsel hired a "so-called fee-litigation specialist," who is claiming $75,000 just to litigate the fee recovery, plus fees for the appeal if successful. *Id.* The court concluded that these fees were excessive and that Petitioners had ignored the Supreme Court's admonition that "a request for attorney's fees should not result in a second major litigation." *Id.*

Under the totality of these circumstances, the Court of Appeals properly held that the district court did not abuse its discretion in denying fees to Petitioners. The decision provides ample latitude for an attorney to vigorously pursue meritorious claims consistent with an attorney's ethical duties without exceeding the acceptable standards of advocacy.

CONCLUSION

This case involves an intensely factual inquiry and correctly applied well-settled law to those facts. The decision is not in conflict with prior decisions of the Supreme Court or other circuits. The petition should be denied.

Respectfully submitted,

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Re: ***Peter v. Carlson, et al.***

Dear Counsel:

Because of questions raised by counsel for the school districts, we are writing to clarify the State's position on its interpretation of Rule 3525.1150 in light of the *Agostini* case.

The position that we have articulated – that the State will not enforce the Rule to the extent it prohibits special

education and related services at religious schools – refers specifically to subpart 2 of the Rule. That subpart refers to the *location* of special education and related services and currently limits those services to "neutral sites," which include nonsectarian private schools. Because of *Agostini*, the State will no longer enforce the Rule as limited to neutral sites. In effect, the State will be reading the first sentence of the last paragraph of subpart 2 out of the Rule.

Subpart 3, paragraph A, of Rule 3525.1150, which is the subject of counsel's question, deals not with the location of the services, but rather with limits on the *services* that may be provided to any private school student. These limits apply to students at all private schools – sectarian and nonsectarian – and are unaffected by *Agostini* and the subsequent change of policy. Whether a school district is providing services consistent with this subpart is a matter that would be reviewed on a case-by-case basis through the IDEA hearing, monitoring or complaint process, or other audit process.

We hope that this clarifies the State's position on the matter.

Yours very truly,

/s/ Steven Liss
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RLK/sls

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Joan Peter, Sarah Peter, a minor, by and through her parent and natural guardian Joan Peter; Krista Westendorp, a minor, by and through his parents and natural guardians Krista Westendorp and Douglas Westendorp; and Choice In Education Foundation, Inc.,

Plaintiffs,

vs.

Robert Wedl, Commissioner, Minnesota Department of Children, Families and Learning; Arne H. Carlson, Governor, State of Minnesota; Independent School District No. 877 (Buffalo, Minnesota); and Independent School District No. 273 (Edina, Minnesota),

Defendants.

Civil File No. 4-96-642 (DSD/JMM

The Honorable Judge Doty

STIPULATION

Come now the Plaintiffs, by counsel Michael Stokes Paulsen, Daniel L. Bowles, Daniel T. Kadlec, and C. Erik Hawes and defendants Robert Wedl, Commissioner, and Arne H. Carlson, Governor, by counsel Steven B. Liss and stipulate and agree as follows:

1. The parties entered a Stipulation on July 31, 1997, in this matter.

2. Effective October 13, 1997, the State Board of Education amended Minnesota Rule 3525.1150, subpart 2, by striking the sentence: "Special education services provided indirectly or directly to the pupil must be provided at a neutral site that is consistent with Minnesota Statutes, section 123.932, subdivision 9."

3. Pursuant to paragraph 6 of the July 31, 1997 Stipulation entered by the parties and the Court's Order of August 4, 1997, the parties agree that claims against the State Defendants, other than the claim for attorneys' fees, are moot and the claims should be dismissed.

4. A joint proposed Order is attached, which may be entered without notice to the parties.

Dated: September 3, 1998

Respectfully submitted

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APR 28 PAGE 2 (4)
-99-1428

Supreme Court, U.S.
FILED
APR 19 2000
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No.

In the

Supreme Court of the United States

AARON WESTENDORP,
A Minor with Disabilities, et al.,

Petitioners,

-versus-

JESSE "THE BODY" VENTURA, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY TO BRIEF IN OPPOSITION

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STATUTES

42 U.S.C. §1988 1

In an attempt to evade review by this Court, respondents resort to the usual tactics to hide the certworthiness of the decision below. Most glaringly, respondents repeatedly assert that "[t]he constitutionality of the State's rule has never been decided, pre- or post-*Agostini*" (Opp. 27 n.16),[1] when in fact the Eighth Circuit *squarely held* that "Minnesota Rule 3525.1150 ... violated the plaintiffs' rights to free exercise of religion, free speech, and equal protection, and the district court properly enjoined its enforcement." Pet. App. 122a-123a. Other examples of distortion by respondents abound. For instance, the Eighth Circuit's *legal* ruling that petitioners, despite having obtained an injunction and consent decree against the State of Minnesota, were not "prevailing parties" under 42 U.S.C. §1988 becomes, in respondents' description, merely an amalgam of "intensely *factual* determinations." Opp. 2 (emphasis added). Also, despite the Eighth Circuit's agreement with respondents' position that a fee award would be improper because respondents had "no choice but to follow *Aguilar* [v. *Felton*, 473 U.S. 402 (1985),]" until that decision was formally overruled in *Agostini* v. *Felton*, 521 U.S. 203 (1997), (Pet. App. 24a), respondents now baldly assert that "whether *Agostini* 'changed the law' is not relevant to the fee decision." Opp. 26 n.15.

Such attempts to distort the record and decision below so as to minimize the significance of the questions presented might well be expected from a respondent in this Court. And in the ordinary case, a denial of review by this Court carries no collateral consequences for the legal system. Here, however, failure to grant review would leave in place a substantial impediment to the enforcement of civil rights of *all* kinds – including essential protections against race and gender discrimination, for example – by depriving civil rights counsel of

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[1] *Accord* Opp. 22 ("[N]either the Eighth Circuit nor the district court in the present matter ever ruled on the constitutionality of the underlying State Rule."); *id.* 27 ("The constitutionality of the underlying State Rule ... has never been decided."); *id.* at 23 n.14 ("[P]etitioners sought to have the State rule declared unconstitutional but never obtained such a decision.").

their attorneys fees *even where, as here, they succeed in proving violations of federal rights*. The Court should rectify this situation at once.

1. That the decision below will radically diminish incentives to bring the cases essential to adequate enforcement of constitutional and civil rights cannot be denied – and, in point of fact, is *not* denied by respondents. Congress enacted fee-shifting statutes, such as §1988, "to *encourage* individuals injured by [infringements of their civil rights] to seek judicial relief." *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, 402 (1968) (emphasis added). This is because private litigation, often brought by impecunious plaintiffs such as petitioners, is necessary to maintain adequate enforcement of federal rights. Obviously, these cases will not be brought to the extent desired by Congress if the plaintiff's attorney can emerge victorious but nevertheless be denied an award of fees (which is why the "basic philosophy of §1988" is that "fee and merits liability run together," *Kentucky v. Graham*, 473 U.S. 159, 171 (1985)). That, however, is precisely the result mandated by the decision below – a holding of broad import for *all* civil rights litigation.

The Eighth Circuit's rule allows civil rights violators to avoid all fee liability. As long as the defense can point to an "intervening" decision favorable to the plaintiff (Pet. App. 16a), it can, under the decision below, settle the case and thereby escape its fee obligations. In that circumstance, the plaintiff's victory will be "because of" the intervening decision, not the lawsuit, and no fees need be paid, provided the defense settles quickly enough to prevent a court decision applying the intervening precedent (which undeniably would give the plaintiff prevailing party status). *Id.* By thus allowing *defendants* to control when they will (and will not) face liability for attorneys fees, the Eighth Circuit's rule will decrease the incentive for plaintiff's counsel to bring civil rights cases. The impact of this disincentive will be most severe in cases such as this one, where plaintiffs have *meritorious* civil rights claims because the

stronger those claims are, the more likely a civil rights violator is to use an "intervening decision" exception.[2]

As if that were not bad enough, the decision below creates a broad precedent allowing civil rights attorneys to be *completely* denied *any* award of fees if, in hindsight, a judge believes that they prosecuted their client's case too vigorously. Instead of taking the usual approach of awarding "reasonable" fees but denying any fees that are unreasonable, *see Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983), the court below held that any excessiveness defeats recovery even of fees that were reasonably incurred and essential to the favorable outcome. *See* Pet. App. 26a-28a.

The Eighth Circuit's inequitable rule threatens to transform §1988 from a viable mechanism for enforcing federal rights into a Catch-22 for the unwary attorney. Unless set aside, that rule will treat zealous prosecution of a civil rights case as a basis for denying fees *entirely*. Because there is no bright line after which incremental efforts on a client's behalf exceed "acceptable bounds of advocacy" (Opp. 29), civil rights attorneys will have the perverse incentive to curtail their efforts on behalf of their clients or, even worse, to redirect their efforts to cases for corporate or other clients that can afford to pay market rates for legal services. Either way, the result is underenforcement of federal rights and reduced incentives for state actors to obey federal law – results that fly in the face of sound public policy

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[2]The Eighth Circuit went so far as to hold that even where a plaintiff's case is so strong under prior law as to make victory "*inevitable*," the defendant can avoid fee liability by settling immediately following an intervening precedent confirming the plaintiff's right to relief. Pet. App. 18a n.4 (emphasis added) (joining *Guglietti v. Sec., HHS*, 900 F.2d 397 (1st Cir. 1990), in rejecting "inevitable victory" theory); *but see Perket v. Sec., HHS*, 905 F.2d 129 (6th Cir. 1990) (adopting "inevitable victory" theory). Here, even apart from *Agostini*, respondents' defeat was inevitable: their first three defenses were rejected by the Eighth Circuit based entirely on pre-*Agostini* evidence and law, and their sole remaining merits defense, the Establishment Clause defense, was ruled "highly questionable" under pre-*Agostini* law. Pet. App. 122a.

and the legislative intent of §1988.[3] This Court should grant certiorari or, at a minimum, call for the views of the Solicitor General on these important issues affecting the efficacy of the federal civil rights enforcement scheme.

2.a. The sum total of respondents' answer to the first Question Presented – whether *Agostini* changed Establishment Clause jurisprudence – is buried in a footnote. *See* Opp. 26 n.15. As shown in the Petition (Pet. 18-19), the Eighth Circuit necessarily concluded that *Agostini* did in fact change the law – a conclusion that utterly flouts *Agostini*'s specific holding that "it was *Zobrest* [v. *School Catalina Foothills District*, 509 U.S. 1 (1993)] – and not this case – that created 'fresh law.'" 521 U.S. at 225. Tellingly, even respondents do not try to reconcile this Court's own assessment of *Agostini* with the Eighth Circuit's.

All respondents can muster in defense of this holding below is that "[t]he questions [sic] of whether *Agostini* 'changed the law' is not relevant to the fee decision." Opp. 26 n.15. We wholeheartedly agree that a *favorable* new precedent should not disqualify plaintiffs from recovering fees, but the Eighth Circuit ruled otherwise. The court held a fee award improper because "until the Supreme Court's decision in *Agostini*, the State had no choice but to follow *Aguilar*." Pet. App. 24a. Obviously, then,

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[3]The situation becomes more bizarre still when combined with the Eighth Circuit's "intervening decision" exception: The plaintiff can accept a settlement offer only by running the risk that fees will not be recoverable (because the defendant can claim that intervening precedent, not the litigation, caused the settlement), but if the plaintiff rejects a settlement offer and continues to litigate, the plaintiff runs the same risk (because the plaintiff's fees will be deemed "excessive" and hence unrecoverable). Interestingly, what the Eighth Circuit thought *made* the hours of petitioners' counsel excessive was the fact that counsel knew that *Agostini* was pending in this Court and that the resulting decision would be relevant to respondents' Establishment Clause defense. Pet. App. 24a. Clearly, however, counsel's hope that the eventual decision in *Agostini* might further refute one of respondents' several affirmative defenses was no reason to *cease* zealously litigating his client's meritorious claims, including discovery aimed at proving those claims.

the Eighth Circuit *did* view *Agostini* as a break from prior law – precisely the view that *Agostini* rejected.[4]

b. The Eighth Circuit's view also contravenes the rule of *Harper* v. *Virginia Department of Taxation*, 509 U.S. 86 (1993), that this Court's decisions are entitled to full retroactive effect. *See* Pet. 13-19. Again unable to deny the rule invoked by petitioners, respondents can only assert that "the lower courts in the present case applied *Agostini* retroactively." Opp. 25-26. That, of course, is simply not true – which explains why respondents refer to *Agostini* as "new law." Opp. 21.

If the court below had followed *Harper* and treated *Agostini* as if it were the law "as to all events, regardless of whether such events predate or postdate" *Agostini* (509 U.S. at 97), it would have been required to treat *Agostini* as if it *predated* the litigation. Had it so treated *Agostini*, this case admittedly would have been governed by the "general rule [that] when a party 'settles with government authorities following the commencement of a citizen suit, it is permissible to infer that the citizen suit motivated the settlement.'" Pet. App. 15a. Instead, the Eighth Circuit deemed that rule inapplicable based on the "intervening" nature of *Agostini* (Pet. App. 16a) and, in doing so, flouted *Harper*'s holding that, even in the case of overrulings, decisions of this Court declare not only what the law is, but also what it *always was*.

c. This Court should not tolerate such flagrant disregard for its precedents. Even if full review is not deemed necessary here, the Court should summarily vacate and remand this case for reconsideration in light of the holding in *Agostini* that it did not create new law and *Harper's* mandate that *Agostini*

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[4]Respondents protest (Opp. 26 n.15) that the Eighth Circuit considered *Agostini* only "as a factual matter in determining the impact of this litigation on the conduct of the state." What respondents overlook, however, is that it would have been impossible to conclude that the State abandoned its "position that the case was controlled by *Aguilar*" *because* of *Agostini* unless *Agostini* changed the controlling rule. Pet. App. 16a.

be treated as preexisting precedent. *See* R. Stern, *et al.*, *Supreme Court Practice* §5.12(c), at 251 (7th ed. 1993) (explaining that "summary disposition is appropriate to correct clearly erroneous decisions of lower courts") (citing cases).

3. In addition, plenary review is needed to determine the validity of the Eighth Circuit's new "intervening decision" exception to §1988. As shown in the Petition (Pet. 19-29), such an exception is not only unprecedented, but also contrary to decisions from other circuits. Respondents again resort to denying the plain import of the Eighth Circuit's decision, arguing that the court "d[id] not hold that an intervening favorable decision deprives a party of prevailing party status." Opp. 22. As shown above, however, the fact that *Agostini* intervened (and, in the Eighth Circuit's view, changed the law) was the cornerstone of the court's holding that petitioners were not entitled to fees.[5]

Respondents try to distinguish the circuit cases that found prevailing-party status despite intervening precedents favorable to the plaintiff. *See* Opp. 19-22. But this effort only highlights the grave threat posed to the integrity of the civil rights enforcement scheme by the rule adopted below, which leaves it to the *defendant* to determine a plaintiff's entitlement to a fee award where intervening legal developments occur.

In the rare case where the defendant forthrightly admits it changed its conduct because of the litigation, the plaintiff will get the benefit of the intervening decision in determining fee eligibility. *See Associated Builders v. Orleans Parish Sch. Bd.*,

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5The court below cited additional factors in its discussion of "special circumstances," including the amount of fees claimed (which the panel thought too large) and the potential availability of fees against other co-defendants (which the panel thought a reason for denying fees entirely). Pet. App. 23a-30a. These factors are makeweight: As noted above, if the fee claim were excessive, that would be a reason to reduce the *size* of the award, not to deny fees entirely. Similarly, the potential availability of fees from co-defendants might go to the size of a fee award against the State versus other defendants, but cannot excuse the State from all fee liability given the consent judgment and injunction entered against the State and the Eighth Circuit's holding that the State's rule violated petitioners' constitutional rights. Pet. App. 122a-123a.

919 F.2d 374, 378 (5th Cir. 1990). If the defendant chooses to continue resisting the plaintiff's claim despite intervening precedent confirming the plaintiff's right to relief, as in *Perket*, 905 F.2d 129 (6th Cir. 1990), the plaintiff can receive fees. But where, as here, a defendant gives up in the immediate wake of such an intervening development and writes self-serving letters claiming it settled because of "new law," the defendant can escape its fee obligations.[6]

Under §1988, fee awards must depend not on strategic conduct by the defendant, but on the results achieved by the plaintiff. *See, e.g., Farrar* v. *Hobby*, 506 U.S. 103, 111 (1992) ("[T]o qualify as a prevailing party, a civil rights plaintiff must obtain at least some of the relief on the merits of his claim," whether by way of "an enforceable judgment against the defendant" or "comparable relief through a consent decree or settlement."). Thus, in addition to diluting the strong incentives Congress intended for civil rights cases, the Eighth Circuit's "intervening decision" exception to §1988 distorts the proper focus of the fee inquiry under *Farrar*.

Unquestionably, petitioners satisfied the *Farrar* standard. They won an enforceable settlement and injunction against the State that prohibited enforcement of its rule (just in time for the new school year) and obligated the State to secure a prompt repeal of the rule. In addition, petitioners won a judgment by the Eighth Circuit that the rule is unconstitutional. These favorable results materially altered the legal relationship between petitioners and the State and thus conferred prevailing party status. *See Farrar*, 506 U.S. at 113 ("[M]aterial alteration of the legal relationship between the parties occurs [when] the *plaintiff*

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[6]Respondents' attempted distinctions of these decisions (and the others cited in the Petition, Pet. 19-26) are entirely artificial, as can be seen by asking a simple question: *Would the results in those cases have been the same had those courts applied the rule of the Eighth Circuit in this case?* The answer is plainly no. In each case, the defendants relied (much more reasonably than respondents did here) on prior law but were nevertheless required to pay attorneys fees.

becomes entitled to enforce a judgment, consent decree, or settlement against the defendant.") (citation omitted; emphasis added); *see also Maher* v. *Gagne*, 448 U.S. 122, 129 (1980) ("The fact that [petitioners] prevailed through settlement rather than through litigation does not weaken [their] claim to fees.").

The Eighth Circuit was able to deny attorneys fees only by complicating the circuit split noted in *Friends of the Earth* v. *Laidlaw Environmental Services*, 120 S.Ct. 693, 711-12 (2000), over the continued vitality of the "catalyst" theory. The circuits previously divided over whether that theory (which focuses on the reasons why a defendant, in cases mooted short of an enforceable judgment or settlement, *voluntarily provides* plaintiff's requested relief) survives *Farrar* (which focuses on the results obtained by a plaintiff through an enforceable judgment or settlement). *Id.* The Eighth Circuit, however, has now complicated matters by ruling that, even where a plaintiff satisfies *Farrar* through an enforceable settlement or consent decree, that plaintiff cannot recover fees as a matter of law *unless* he can *also* prove that the litigation (as opposed to intervening precedent or some other cause) was the catalyst for the defendant's decision to negotiate the settlement or consent decree. *See* Pet. App. 14a ("Thus, as we read *Farrar* ... not only must the plaintiff have obtained relief through a judgment or settlement but also the lawsuit must be a catalyst of legal change favorable to the plaintiff."). The Eighth Circuit's remarkable new "*Farrar*-plus-catalyst" rule makes it much more difficult for civil rights attorneys to recover fees in cases concluding in settlements or consent decrees, and thus discourages these favored mechanisms for resolving such litigation. The Court should use this opportunity to clarify *Farrar's* meaning and its relationship to catalyst theory.

4. Finally, the Court should not be fooled by respondents' other scattershot arguments as to why a fee award is improper under *Farrar*, even apart from the Eighth Circuit's anti-plaintiff gloss on *Farrar*. Respondents repeatedly assert that

"[p]etitioners never in fact 'defeated' the State's [*Aguilar*] defense" and that "[t]he constitutionality of the State's rule has never been decided" (Opp. 27 n.16), but, as noted above, these assertions are demonstrably false. The Eighth Circuit's merits opinion held, in sustaining liability against a co-defendant, that "Minnesota Rule 3525.1150 ... violated the plaintiffs' rights to free exercise of religion, free speech, and equal protection." Pet. App. 122a-23a. This ruling explicitly rejected "[t]he only compelling interest identified by the State of Minnesota." Pet. App. 122a (rejecting the State's Establishment Clause defense).[7]

Equally misleading is respondents' argument that petitioners did not really "prevail" because the consent decree and injunction against the State "did not provide Petitioners the relief they sought," *i.e.*, the right to receive paraprofessional services at religious schools. Opp. 21. Because educational services in Minnesota are provided by local school districts, not by the State, that right could not have been granted by or against the State alone, nor could the State repeal the rule (enacted by the nonparty State Board of Education). *The most that could have been required of the State was what petitioners actually received – namely, a judicially enforceable requirement that the State would not enforce the rule against them and would promptly take affirmative steps to have it repealed.* This victory was significant not only because it ended the State's discrimination against these children, but also because it removed the key obstacle to the services they so desperately need.[8] Only this Court's intervention

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[7]This ruling was also essential to the Eighth Circuit's judgment against a co-defendant school district and thus cannot be dismissed as "dicta" (Opp. 10 n.7): If the State's rule was mandated by the Establishment Clause, it would not have been unconstitutional for the school district to follow that rule and refuse to provide on-site services.

[8]Indeed, Sarah's school district promptly agreed to provide on-site services once the State rule became unenforceable. The State emphasizes that Aaron's school district continued to litigate despite the rule's unenforceability but overlooks the facts that, as the Eighth Circuit held, the school district "conceded that it relied on Minnesota Rule

can ensure that petitioners' victory is not a Pyrrhic one and that proper incentives for civil rights enforcement are restored.

* * *

The Petition for Certiorari should be granted, and the decision below set for plenary argument or summarily reversed. Alternatively, the Court should call for the views of the Solicitor General.

Respectfully submitted,

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3525.1150 when it denied services to Aaron ... and further conceded that Minnesota Rule 3525.1150 prevented it from providing services to Aaron." Pet. App. 123a. As recognized by both panels of the Eighth Circuit, the State's rule *mandated* such discrimination. *See* Pet. App. 115a ("Minnesota law prohibited school districts from providing [on-site] services at private religious schools."); Pet. App. 18a (acknowledging that this "is what the rule did"). The Eighth Circuit also held that "Minnesota Rule 3525.1150 explicitly discriminated against children who attended private religious schools" (Pet. App. 121a) and was motivated by "religious animus." Pet App. 126a. The State, therefore, shares responsibility for the infringement of petitioners' rights, and thus is jointly and severally liable for fees. *See Koster v. Perales*, 903 F.2d 131, 140 (2d Cir. 1990) (holding that "joint and several liability for attorneys fees ... is appropriate where the action or inaction of several defendants produces a single indivisible injury").